Petition

81-905

Office - Supreme Court, U.S.
FILED
NOV 18 1981
ALEXANDER L. STEVAS,
CLERK

No.

IN THE

Supreme Court of the United States

October Term, 1981

JOSEPH D. LAZZARA

Petitioner

vs.

THE UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BARRY A. COHEN
RICHARD G. PIPPINGER
(Counsel of Record)

COHEN, PIPPINGER & SHIBLEY
100 Twiggs Street
Suite 4000
Tampa, Florida 33602
(813) 225-1655
Counsel for Petitioner

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

QUESTIONS PRESENTED

1. Whether a mere customer of a racketeering enterprise is criminally liable under 18 U.S.C. § 1962?

2. Whether joint trial principles of *Kotteakos v. United States,* 328 U.S. 750 (1946) are inapplicable to RICO prosecutions?

3. Whether statements against interest under Rule 804(b)(3) of the Federal Rules of Evidence must be almost a direct statement that a person was legally at fault to be admissible?

LIST OF PARTIES

Rosario Palermo
William H. Brown, a/k/a Bill
John D. Fisher
Robert D. Young
Joseph Macaluso, a/k/a Joe
Frank Scionti
Sam C. Martino
Paul Guarino
Jimmy Farina
Berton B. Chase, a/k/a Bert
Rolando Gonzalez Rodriguez, a/k/a Roland Rodriguez
Joseph C. Russello, a/k/a Joe
Amalia Morgado
United States of America

TABLE OF CONTENTS

Page

Questions Presented i

List of Parties i

Table of Contents iii

Table of Authorities iv

Opinion Below 1

Jurisdiction 1

Statutes Involved 2

Statement of the Case 6

Reasons for Granting the Writ 12

Point 1 13

Point 2 17

Point 3 23

Conclusion 26

TABLE OF AUTHORITIES

Cases **Page**

Berger v. United States,
295 U.S. 78 (1935) 20, 21, 23

Gichler v. Troiano,
410 F.2d 238 (D.C. Cir. 1969) 23-24, 25

Kotteakos v. United States,
328 U.S. 750 (1946) ..... i, 17, 18, 20, 21, 22

United States v. Anderson,
626 F.2d 1358, 1364, n.8 (8th Cir. 1980) 16

United States v. Elliott,
571 F.2d 880 (5th Cir. 1978) 17

United States v. Mandel,
591 F.2d 1347, 1374-76 (4th Cir. 1979) 14, 15

United States v. Marrifield,
515 F.2d 877, 880-881 (5th Cir. 1975) 16

United States v. Martino, et al,
648 F.2d 367 ..... 1, 15, 17, 18, 19, 23

United States v. Turkette,
____ US ____, 101 S.Ct. 2524 (1981) 13, 14, 15

Zenith Radio Corp. v. Matsushita Elec. Ind. Co.,
505 F.Supp. 1190, 1259-1261 (D.C. Penn. 1980) 23

Statutes:

18 U.S.C. 1341 2,7

18 U.S.C. 1511 16

18 U.S.C. 1955 16

18 U.S.C. 1961 2

18 U.S.C. 1962 ..... 2, 6, 13, 15, 16

18 U.S.C. 3231 7

Rules of Federal Evidence 804(b)(3) ..... i, 6, 23, 24, 25

IN THE

Supreme Court of the United States

October Term, 1981

No.

JOSEPH D. LAZZARA

Petitioner

vs.

THE UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Joseph D. Lazzara petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals is styled *United States v. Martino, et al.* and is reported at 648 F.2d 367.

JURISDICTION

The opinion of the lower Court was filed on June 19, 1981. (App. A, *infra*). The judgment of the Court of Appeals has not been rendered because Lazzara procured a stay until December 10, 1981. A petition for rehearing and a petition for rehearing en banc were timely filed. (App. B & C, *infra*). Said petitions were denied on September 17, 1981. (App. D, *infra*).

STATUTES INVOLVED

18 U.S.C. § 1341.

"§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretense, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

18 U.S.C. § 1961.

"§ 1961. Definitions.

As used in this chapter –
(1) 'Racketeering activity' means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in

narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment), if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to mail wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c)

(relating to embezzlement from union funds), or (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

(2) 'State' means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) 'person' includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) 'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) 'pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;. . ."

18 U.S.C. § 1962.

"1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which

such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity of the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a patter of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such

enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section."

Federal Rules of Evidence, §804, 28 U.S.C.

"(a) Definition of unavailability. – 'Unavailability as a witness' includes situations in which the declarant –. . . (4) is unable to be present or to testify at the hearing because of death. . .
(b) Hearsay exceptions. – The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:. . . (3) Statement against interest. – A statement which was at the time of its making. . . so far tended to subject him to civil. . . liability. . . that a reasonable man in his position would not have made the statement unless he believed it to be true. . ."

STATEMENT OF THE CASE

On June 8, 1977, a 35 Count Indictment was filed in District Court, Tampa, Florida charging Lazzara and others with conspiracy, racketeering and mail fraud. Lazzara was charged in Count 1 with conspiracy to conduct and to participate in the conduct of the affairs of an enterprise through a pattern of racketeering activity [Section 1962(d) of Title 18]. Lazzara was charged in Count 2 with racketeering in that he did conduct or participate in the conduct of the affairs of an enterprise through a pattern of racketeering activity [Section 1962(c) of Title 18]. Lazzara was charged in Count 5 with the crime of mail fraud in-

volving a letter which was mailed by Lazzara's attorney to Allstate Insurance Company concerning an insurance claim on the "Miami laundromat fire" [Section 1341 of Title 18]. Lazzara was charged in Count 6 with the crime of mail fraud involving a claim review report for the "Miami laundromat fire" mailed by Curt Blocker, Commercial Claims Director, Allstate Insurance Company to the Allstate Insurance Company home office. Lazzara was charged in Count 28 with the crime of mail fraud involving a property adjustor's first report on the "Central Professional Building fire" which was mailed by Joseph Carter to Cincinnati Insurance Company. Lazzara was charged in Count 29 with the crime of mail fraud involving a draft for the "Central Professional Building fire" mailed by Cincinnati Insurance Company to Poe and Associates [See Vol. #1, Item 1].

After trial by jury, Lazzara was found guilty of Count 1 [Conspiracy], Count 2 [Racketeering], Count 5 [Mail fraud, Miami laundromat fire] and Count 6 [Mail fraud, Miami laundromat fire]. Lazzara was found innocent on Count 28 [Mail fraud, Central Professional Building file], and Count 29 [Mail fraud, Central Professional Building fire]. [See: Vo. 4, Item 394].

Lazzara was adjudged guilty on the charge returned under each guilty verdict. On April 21, 1978, Lazzara was sentenced to a 10 year term of imprisonment on Count 1, a 10 year term of imprisonment on Count 2, a 5 year term of imprisonment on Count 5, and a 5 year term of imprisonment on Count 6. These terms of imprisonment were all to run concurrently with each other. [See: Vol. 4, Item 460]. Jurisdiction in the trial court was premised upon 18 U.S.C. § 3231.

A. Government's Case

The prosecution's first key witness against Lazzara was Willie Noriega. Noriega was a professional arsonist, between 1973-1976. [Vol. 53, p. 741-742]. According to Noriega, he was approached in September, 1973, by John Rivera. Rivera offered Noriega an opportunity to burn a laundromat in Miami, Florida. This meeting occurred at the Castaway's Lounge in Tampa, Florida.[1] Also present at this meeting was Guarino. Noriega ultimately agreed to burn the Miami laundromat. [Vol. 49, p. 32-35].

Rivera told Noriega that the manager of the laundromat was a conscientious employee. To eliminate this problem, Rivera and Noriega agreed to transport McElroy to the Miami laundromat. McElroy was to work at the laundromat. The men believed that McElroy would cause the conscientious manager to leave her job. [Vol. 49, p. 32-44].

According to Noriega, McElroy was transported to Miami by Noriega, Guarino and Rivera. Noriega testified that Lazzara gave him a map showing the location of the laundromat. Lazzara owned the laundromat. Noriega testified that Lazzara told him that the laundromat was losing money and that he [Lazzara] wanted the business burned. [Vol. 49, p. 32-44].

In October, 1973, Noriega, Guarino and Scionti returned to Miami and took McElroy to the bus station The trio then returned to the laundromat, used a key to enter the back door and burned the building. Noriega claimed that shortly after starting the fire, he called Rivera and informed River that the laundromat had burned. [Vol. 49, p. 32-44].

---

[1]The Castaway's Lounge was owned by Lazzara and managed by Rivera [Vol. 49, p. 34-35].

Noriega testified that he met Lazzara and Rivera at the Castaway's Lounge on the following day. According to Noriega, Lazzara gave Rivera money. Rivera and Noriega then went to a Lum's restaurant to count the money [Vol. 49, p. 32-44].

Noriega claimed that he received $1,500 that day. Noriega testified that he expected to receive a total of $4,000, however additional funds were never received. [Vol. 49, p. 32-44].

According to Noriega, he was approached about burning a second building during 1975. During that year, Noriega and Russello discussed burning the Central Professional Building.[2] An agreement was reached and shortly thereafter, Noriega burned the building. Lazzara's station wagon was also consumed in the fire [Vol. 50, p. 246-274].

Prior to burning this building, Noriega allegedly told Lazzara of his plan. On this occasion, Noriega claimed that Lazzara told him that the station wagon was defective and he [Lazzara] would like to burn the vehicle. Noriega testified that he agreed to place the station wagon near the building so that both the building and the vehicle could be consumed by the fire. [Vol. 50, p. 246-274].

Noriega claimed that a container of gasoline, used to start the fire at the office building, was taken from a shed at the Castaway's Lounge. According to Noriega, Lazzara knew that the shed was being used by Noriega to store gasoline [Vol. 50, p. 246-274].

The prosecution's second key witness against Lazzara was Joseph Carter. Carter was an insurance adjuster for

[2]This building was next door to the Castaway's Lounge [Vol. 50, p. 251].

20 years, specializing in fire claims [Vol. 56, p. 4-6]. Carter was introduced to Lazzara at the Castaway's Lounge by Noriega while Carter was acting as the insurance adjuster for the Central Professional Building fire. Carter asked questions about Lazzara's burned vehicle so that he [Carter] could put the information in his file. During the conversation, Lazzara purportedly discussed future ventures relating to the burning of buildings. During this conversation, Lazzara purportedly admitted giving Noriega his [Lazzara's] station wagon to burn. The burning of a bar owner's car was supposed to provide a cover for the burning of the building. [Vol. 56, p. 107-109].[3]

The government's third key witness against Lazzara was David Morash. Morash was an employee of Allstate Insurance Company. Allstate insured the Miami laundromat. Morash identified two documents which traveled through the mails and which were related to Lazzara's insurance claim [Conjo, Inc.]. Neither letter was actually mailed by Lazzara. [Third Supp. Record Vol. 1, p. 1-20].

The government's final key witness against Lazzara was James McAuley. McAuley was an investigator for the Dade County [Miami] Fire Department. McAuley investigated the Miami laundromat fire. McAuley identified a hot plate taken from the burned laundromat. A plastic container had melted on top of this plate [Third Supp. Record, Vol. 6, p. 1-22].

B. Lazzara's Defense

The defense's first key witness was Lazzara. Lazzara testified that he purchased the Miami laundromat in 1979 for $42,300. He purchased a $40,000 insurance policy as

[3]Noriega did not recall this conversation during his testimony.

security for the loan. The sales contract did not include purchase of the building which housed the laundromat [Vol. 27, p. 6-9].

Lazzara entered into an agreement in September, 1973, to sell the laundromat for $17,000.[4] Lazzara sent McElroy to Miami via the bus to help out until the sale could be accomplished. McElroy was to do the physical work while the manager continued to handle the money and the books [Vol. 27, p. 15-22].

The fire in the building occurred while McElroy was asleep in the back of the laundromat. McElroy admitted to Lazzara that he awoke after the fire started and fled the building.[5] [Vol. 27, p. 27].

After the fire, Noriega approached Lazzara and asked to be paid for the fire. Lazzara sent Noriega on his way because he [Lazzara] had not asked Noriega to burn the business. [Vol. 27 p. 32-33].

On August 17, 1975, Lazzara's station wagon was burned during a fire at the Central Professional Building. Lazzara had no advance knowledge that the vehicle would be burned. [Vol. 27, p. 56-62].

Lazzara denied storing gasoline in the shed behind the Castaway's. He also denied knowing that anyone else stored gasoline there. [Vol. 27, p. 65-66].

Lazzara testified about his first and only meeting with Carter following the Central Professional Building fire. The meeting occurred at the package store attached to the

---

[4]The insurance settlement was for $15,000. [Vol. 27, p. 29].

[5]McElroy was dead by trial date. [Vol. 27, p. 34].

Castaway's Lounge. Carter introduced himself as the adjuster for the building next door. Carter told Lazzara that Lazzara's car was responsible for the fire and that he [Lazzara] could be sued. At this point, Lazzara became angry and asked Carter to leave. Noriega was in hearing distance of the entire conversation. [Vol. 27, p. 76-79].

Lazzara's second key witness was Oakes. In 1973, Oakes was a laundromat repairman in Miami. He serviced Lazzara's laundromat. In September, 1973, Oakes contracted to buy Lazzara's laundromat for $17,000. The laundromat burned before the deal could be concluded. Oakes testified that, at that time, a man lived in a back room of the laundromat. The man also used a hot plate. [Vol. 26, p. 1-12].

Three witnesses testified that Lazzara's station wagon ran well prior to the fire. [Vol. 26, p. 20-25, Matthews; Vol. 26, p. 28-31, Blesi; Vol. 26, p. 37-39, Fortin].

Lazzara's final key witness was Ruth Kennedy McElroy. Ruth McElroy was the mother of Hiram McElroy, the man Lazzara sent to Miami to work at the laundromat. Hiram McElroy went to Miami using traveling money supplied by Lazzara. Hiram McElroy returned to Tampa about one month after he left. Hiram McElroy told his mother that he was sleeping at the laundromat when an explosion occurred. Hiram suspected that the explosion was caused by a little stove which he may have left on. The Court ultimately sustained the prosecution's hearsay objection to this testimony and instructed the jury to disregard it. [Vol. 35, p. 1-8].

REASONS FOR GRANTING THE WRIT

Each of the three questions presented through this petition addresses an important federal question which should be decided by this Court. In addition, each question has

been answered by the Fifth Circuit in a manner which conflicts with a decision of this Court or the decision of another Circuit Court of Appeal. The first question addresses the proper construction of the federal racketeering statute. The second question illustrates how the integrity of the fact finding process can be effectively destroyed by an overly broad construction of that statute. The third question addresses an important evidential ruling to Lazzara's specifically, and to the effective administration of the criminal justice system generally.

1.

Whether a mere customer of a racketeering enterprise is criminally liable under 18 U.S.C. § 1962.

In pertinent part, 18 U.S.C. § 1962 provides:

> "(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate. . . commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. . . ."

Last term in *United States v. Turkette,* ____ U.S. ____, 101 S. Ct. 2524 (1981), this Court addressed this statute and distinguished the "enterprise" from the "pattern of racketeering activity" by which the enterprise is operated. Both terms were defined in an extremely broad manner. In light of the Turkette decision, the only remaining dispute as to the scope of the statute relates to the activity which an individual [not the enterprise] must do in order to be criminally liable under the statute.

To settle this remaining dispute, one must first turn to the statutory language. A person must be "employed by or associated with" the enterprise in order to be criminally liable. Since the term "associated with" is extremely broad, minor or even innocent contact with the enterprise would seem to satisfy the association requirement. Thus, this phrase gives no real guidance in determining what an individual [not the enterprise] must do to violate the statute. However, another portion of the statute does give such guidance.

To violate the statute, an individual must "conduct or participate directly or indirectly in the conduct of such enterprise's affairs". This portion of the statute is extremely important to the determination of individual liability. It is the construction of this portion of the statute which has generated conflict between Circuit Court decisions.

In *United States v. Mandel,* 591 F.2d 1347; 1374-1376 (4th Cir. 1979) the Court determined that to violate this statute, an individual must be involved in the *operation or management* of the enterprise's affairs. Thus, *Mandel,* supra., reaches those associates of the enterprise who function together as a continuing unit with a common purpose. Such an approach ties together very well with the concept of the enterprise approved in *Turkette,* supra., at 2528.[6]

---

[6]The portion of the panel decision in *Mandel,* supra., relied upon by Lazzara was not taken to the en banc court. Hence, that portion of Mandel was not disturbed by the en banc decision. The portion of the panel decision relied upon related to the government appeal [Case #78-5022]. A review of the case numbers on the en banc decision [602 F.2d 653] indicates that the government appeal was not before the en banc court.

In *Martino,* supra., the Fifth Circuit twice rejected Lazzara's contention that, mere customers of the enterprise's arson service do not conduct or participate directly or indirectly in the conduct of the enterprise's affairs. *Martino,* supra., at 382 and 402. The Martino court went further and determined that by committing two predicate crimes related to the affairs of the enterprise, a person participates in the enterprise and thus violates RICO. *Martino,* supra., at 403. The Martino court failed to appreciate that a person who *procures* two predicate crimes may be vicariously responsible for those crimes and yet not participate in the management or operation of the enterprise.

Under *Turkette,* supra., the enterprise is comprised only of those associates who function as a continuing unit with a common purpose. Under *Martino,* supra., a person can violate the statute and yet not be one of the associates who function together as a continuing unit with the requisite common purpose.

Lazzara's case illustrated the importance difference between the Mandel and Martino constructions. Under both *Martino,* supra., and *Mandel,* supra., those persons who assist in the management of the enterprise or who personally assist in carrying out the acts of racketeering activity can legitimately be considered a part of the enterprise's structure. Such persons operate the enterprise, have a common purpose and should be knowledgeable enough about the activities of the enterprise to appreciate the additional risks involved. However, under *Mandel,* supra., mere customers would not be subject to prosecution under 18 U.S.C. § 1962; but would, of course, be subject to prosecution for the underlying acts of racketeering activity.

Under *Martino,* supra., persons who are mere customers are subject to prosecution under both 18 U.S.C.

§ 1962 and under the statutes proscribing the underlying acts of racketeering activity. Thus, customers who do not function as part of a continuing unit with anyone and who share no common purpose with each other are tried together "in mass" with each other and with those who manage, control or operate the enterprise. The guilt or innocence of such customers simply cannot be reliably determined in such circumstances.

Lazzara would point out that the word "conduct" was used in other sections of the "Organized Crime Control Act of 1970". It was used in both 18 U.S.C. § 1511 and 18 U.S.C. § 1955. When used in those sections, even the Fifth Circuit has recognized that the term refers to those who participate in the operation of the entity, but does not include customers. *United States v. Marrifield,* 515 F.2d 877; 880-881 (5th Cir. 1975). If basic principles of due process are to be adhered to, the term conduct cannot mean two different things when used in similar context within one piece of legislation.

In *United States v. Anderson,* 626 F.2 1358; 1364, n. 8 (8th Cir. 1980) the Court opined:

> "RICO initially was not very popular among prosecutors. The reluctance to use it no doubt stemmed in part from its complexity and the fear of unleasing a Pandora's box of statutory interpretation problems. Beginning in 1975, the United States Justice Department Task Force specializing in RICO toured the country, lecturing to United States Attorneys and their assistants on the use of RICO. Atkinson, *"Racketeer Influenced and Corrupt Organizations,"* 18 U.S.C. §§ 1961-68: *Broadest of the Federal Criminal Statutes,* 60 J.Crim.L. & Criminology 1, 3 n. 21 (1978). After this promo-

> tional campaign, RICO has grown in popularity. Broad interpretation and simplistic resolution of the complicated statutory language pose the danger of enhancing this popularity beyond the intentions of Congress by bringing within the sphere of RICO minor offenses and by intruding on state power."

The concern expressed by the Anderson Court is shared by every defense lawyer who has faced the ever expanding scope of the racketeering statute. Each appellate decision since *United States v. Elliott,* 575 F.2d 880 (5th Cir. 1978) has moved closer to turning the carefully crafted piece of legislation into an arbitrary weapon to be used at the discretion of federal prosecutors against persons who the prosecutors believe to be bad actors. Lazzara simply submits that it is now time for this Court to address this important issue, reconcile the conflict in decisions, and return the racketeering statute to its intended territory.

2.

Whether joint trial principles of *Kotteakos v. United States,* 328 U.S. 750 (1946) are inapplicable to RICO prosecutions?

In *Kotteakos v. United States,* 328 U.S. 750 (1946), the indictment charged a single conspiracy but the government proved multiple conspiracies in a multi-defendant complex case. This Court reversed finding prejudicial error under the facts of the case. In *Martino,* supra., the appellants (including Lazzara) contended that the indictment charged a single conspiracy, but that the government proved multiple conspiracies in a multi-defendant complex case. The Martino court at p. 8244 dismissed Lazzara's contention in the following manner:

> "Finally, appellants cite *Kotteakos v. United States,* 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed.. 1557 (1946), attacking the indictment on the ground that it alleges only one conspiracy while the government's evidence establishes multiple conspiracies. They contend that this results in a variance that substantially prejudiced their rights contrary to *Kotteakos.* We disagree. This argument has been considered in *Elliott, Diecidue,* and *Bright, supra.,* and in *United States v. L'Hoste,* 609 F.2d 796 (5th Cir.), *cert. denied,* ____ U.S. ____, 101 S.Ct. 104, 66 L.Ed.2d 39 (1980). In *L'Hoste* we resolved this issue adverse to the appellants, stating: 'If the Government proves multiple conspiracies and a defendant's involvement in at least one of them, then clearly there is no variance affecting that defendant's substantial rights.' 609 F.2d at 801, *citing United States v. Wayman,* 510 F.2d 1020 (5th Cir.), *cert. denied,* 423 U.S. 846, 96 S.Ct. 84, 46 L.Ed.2d 67 (1975). Following the path of *L'Hoste,* we find no variance affecting the appellants' substantial rights.
>
> We find no merit of any of appellants' challenges to the indictment."

Clearly, in *Martino,* supra., the court was faced with a case which was factually indistinguishable from *Kotteakos,* supra. In *Kotteakos,* supra. Simon Brown, who secured FHA home improvement loans for customers of his construction business, decided that brokering such loans could become a profitable sideline. He created and operated an "enterprise" specializing in obtaining fraudulent FHA loans, fraudulent in that they were not used for purposes required by law and stated in the ap-

plications. Brown was assisted in operating this enterprise by employees and others who located applicants, assisted in preparing false documents, and performed various other tasks. For his services Brown charged 5% of each loan, handling over 100 before he was caught.

Conspiracy to violate the National Housing Act was charged against 32 persons, mostly borrowers. Brown pleaded guilty and testified against his former customers, 19 of them in a joint trial. Kotteakos and Regenbogen had been introduced by Lekacos to Brown, who obtained four loans for them. They had had no connection with any other defendant or transaction, or with Brown or his organization, apart from those loans. The Court of Appeals made short work of the government's attempt to justify charging them as having been "all parties to the enterprise". 151 F.2d at 170. However, the Court thought the error harmless, since the jury must have found that each defendant conspired separately with Brown in order to find them members of the conspiracy charged. The Supreme Court reversed, holding that the error could not be considered harmless where so many unrelated undertakings, in which the only common purpose was that of Brown to broker as many fraudulent loans as he could, were brought together for common trial.

In *Martino,* supra., Noriega, like Brown, operated an enterprise. Like Brown, he was regularly assisted by a few confederates. Like Brown, he dealt mainly with individuals who, except for a single transaction, had no connection with him, his enterprise, his confederates, or any similar transaction. Like Brown, he testified against them all in a mass trial.

The Martino court set down a rigid rule against which to measure Lazzara's prejudicial variance claim. "If the

government proves multiple conspiracies and a defendant's involvement in at least one of them" then there is no variance affecting the defendant's substantial rights. Such a rule is a flat repudiation of the rule announced in *Kotteakos,* supra., and for that matter a flat repudiation of the rule announced in *Berger v. United States,* 295 U.S. 78 (1935) as well.

In *Berger,* supra., the defendants were charged with one conspiracy, but the government's evidence established two. The Berger court accepted jurisdiction in the case to determine whether such a variance was per se fatal. Specifically, the Berger court opined:

> "It is settled by the great weight of authority that, although an indictment charges a conspiracy involving several persons and the proof establishes the conspiracy against some of them only, the variance is not material. But several circuit courts of appeals have held that if the indictment charges a single conspiracy, and the effect of the proof is to split the conspiracy into two, the variance is fatal. Thus it is aid in *Telman v. United States* (C.C.A.) 67 F. (2d) 716, 718: 'Where one large conspiracy is charged, proof of different and disconnected smaller ones will not sustain a conviction.' In support of that statement the various decisions upon which petitioner here relies are cited. This view, however, ignores the question of materiality; and should be so qualified as to make the result of the variance depend upon whether it has substantially injured the defendant.
>
> In the present case, the objection is not that the allegations of the indictment do not describe the

> conspiracy of which petitioner was convicted, but, in effect, it is that the proof includes more. If the proof had been confined to that conspiracy, the variance, as we have seen, would not have been fatal. Does it become so because, in addition to proof of the conspiracy with which petitioner was connected, proof of a conspiracy with which he was not connected was also furnished and made the basis of a verdict against others?
>
> Section 269 of the Judicial Code, as amended (28 U.S.C. § 391 [28 USCA § 391]) provides:
>
> 'On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.'
>
> The true inquiry, therefore, is not whether there has been a variance in proof, but whether there has been such a variance as to 'affect the substantial rights' of the accused." (*Berger,* supra., at 81-82)

It is clear that from *Berger,* supra., that proof of multiple conspiracies under a single conspiracy count in neither a per se harmful variance nor per se harmless variance. Under *Berger,* supra., a reviewing court must look to the underlying facts. The Martino court refused to look at the underlying facts, but chose instead to generate a per se harmless variance rule.

Berger, supra., was a relatively uncomplicated straightforward case. *Kotteakos,* supra., on the other hand was a

complicated multi-defendant case. As mentioned above, factually *Kotteakos,* supra., is indistinguishable from *Martino,* supra. In *Kotteakos,* supra., the court decided whether to extend the rule in *Berger,* supra., to the complex multi-defendant case. In *Kotteakos,* supra., this court opined:

> "It follows that the Berger case is not controlling of this one, nothwithstanding that, abstractly considered, the errors in variance and instructions were identical in character. The Berger opinion indeed expressly declared: 'We do not mean to say that a variance such as that here dealt with might not be material in a different case. We simply hold, following the view of the court below, that, applying section 269 of the Judicial Code, as amended, to the circumstances of this case the variance was not prejudicial and hence not fatal.' 295 U.S. at page 83, 55 S.Ct. at page 631.
>
> On the face of things it is one thing to hold harmless the admission of evidence which took place in the Berger case, where only two conspiracies involving four persons all told were proved, and an entirely different thing to apply the same rule where, as here, only one conspiracy was charged, but eight separate ones were proved, involving at the outset thirty-two defendants. The essential difference is not overcome by the fact that the thirty-two were reduced, by severance, dismissal or pleas of guilty, to nineteen when the trial began and to thirteen by the time the cases went to the jury. The sheer difference in numbers, both of defendants and of conspiracies proven, distinguishes the situation.

> Obviously the burden of defense to a defendant, connected with one or a few of so many distinct transactions, is vastly different not only in preparation for trial, but also in looking out for and securing safeguard against evidence affecting other defendants, to prevent its transference as 'harmless error' or by psychological effect, in spite of instructions for keeping separate transactions separate." *Kotteakos,* supra., at 766-767.

Under the portion of the Kotteakos decision reproduced above, it is clear that in the multi-defendant complex criminal case, a variance between allegation and proof is not to be cavalierly dismissed under a per se non-judicial rule. The Martino court's attempt to do so should be specifically addressed and put to rest by this Court.

3.

Whether statements against interest under Rule 804(b)(3) of the Federal Rules of Evidence must be almost a direct statement that a person was legally at fault to be admissible.

As passed by Congress, Federal Rule of Evidence 804(b)(3) is nothing more than the traditional hearsay exception relating to statements against pecuniary and proprietary interest. *Zenith Radio Corp. v. Matsushita Elec. Ind. Co.,* 505 F.Supp 1190; 1259-1261 (D.C. Penn. 1980). In *Martino,* supra., the Fifth Circuit generated a stricter admissibility test for such statements than the one encompassed by the traditional view or suggested under Federal Rule of Evidence 804(b)(3).

At p. 8254-8255 of the Martino opinion, the court determined that the hearsay statements of Hiram McElroy were inadmissible. Lazzara isolated the exception to the hearsay rule which permitted their introduction and cited *Gichler*

v. Troiano, 410 F.2d 238 (D.C. Cir. 1969), in support of his argument. In *Gichler,* supra., at 242, Fauld made a statement that he and his friends were smoking. Fauld never admitted that careless smoking caused the fire. The court ruled that Fauld's hearsay statement should have been admitted because Fauld's statement indicates that he did something which *may have* caused the fire. The Martino court effectively rejected the Gichler test. By so doing, the Martino court generated irreconcilable conflict in decisions. The Martino court determined that under Rule 804(b)(3), "the statement against interest must be almost a direct, outright statement that the person was legally at fault". Understandably, that court cited no case law for this erroneous proposition.

Ruth McElroy was the mother of Hiram McElroy. Hiram McElroy was the man sent to work at Lazzara's Miami laundromat during 1973. Shortly after the Miami fire, Hiram McElroy made the following declaration to his mother:

> "Q. Would you discuss – did you have a discussion about the fire in Miami with your son?
> A. Yes, I did. I asked why he was back so soon. He said the building had burnt down.
> Q. Did he tell you how?
> A. He said he wasn't certain, but he cooked in the back on a little stove of some description, and he had gone to sleep, and he said he waked up and heard this explosion. I said, well, what was it? He said, I don't know, mother. I might have left the burner on, or something exploded in the back of the building and burned it down. And he said he just rushed out." (Vol. 35, p. 7).

In pertinent part, Rule 804 provides:

> "(a) Definition of unavailability. – 'Unavailability as a witness' includes situations in which the declarant – . . . (4) is unable to be present or to testify at the hearing because of death.
> (b) Hearsay exceptions. – The following are not excluded by the hearsay rule if the declarant is unavailable as a witnesses:. . . (3) Statement against interest. – A statement which was at the time of its making. . . so far tended to subject him to civil. . . liability. . . that a reasonable man in his position would not have made the statement unless he believed it to be true. . . ."

By trial date, Hiram McElroy had died [Vol. 27, p. 34]. Hence, he was an unavailable witness under Rule 804(a)(4). Testimony in the government's own case indicated that the hot plate (stove) in the back of Lazzara's laundromat was a possible source of the fire. [Third Supp. Record, Vol. 6, McAuley, p. 1-22]. Thus, Hiram McElroy's statement to his mother was very much a declaration against interest in that it tended to subject McElroy to civil liability for the fire. It was a declaration concerning a matter that the declarant was personally cognizant. It was a statement that a reasonable man would not have made unless he believed the statement to be true. It was statement that a reasonable man would have known to be against his interest. Consequently, the declaration was admissible against the government's hearsay challenge. *Gichler v. Troiano,* 410 F.2d 238 (D.C. Cir. 1969).

The McElroy declaration was highly relevant evidence in Lazzara's case. The declaration was relevant because it clearly established that McElroy was at the laundromat when the fire started. The declaration contradicted the

testimony of the government's key witness that McElroy was taken to the bus station prior to the fire. [Vol. 49, p. 41]. Hence, the declaration directly impeached a portion of that witness's explanation of the events surrounding the Miami fire. The declaration was also relevant for substantive purposes. The statement tended to establish an alternative explanation for the origin of the fire. By ratifying the trial court's order excluding McElroy's statement against interest, the Martino court created conflict in decisions and also called into question the integrity of the fact finding process as it relates to Lazzara.

CONCLUSION

Based upon the foregoing arguments and authorities, Lazzara respectfully requests an order granting the petition for writ of certiorari so that this Court may answer the important questions set out above and eliminate the conflict in decisions.

Respectfully submitted,

COHEN, PIPPINGER & SHIBLEY
100 Twiggs Street
Suite 4000
Tampa, Florida 33602
(813) 225-1655

Barry A. Cohen

Richard G. Pippinger

Appendix

Office - Supreme Court, U.S.
FILED
NOV 18 1981
ALEXANDER L. STEVAS,
CLERK

81-905
No.

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1981

JOSEPH D. LAZZARA
Petitioner

vs.

THE UNITED STATES OF AMERICA
Respondent

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BARRY A. COHEN
RICHARD G. PIPPINGER
(Counsel of Record)
COHEN, PIPPINGER & SHIBLEY
100 Twiggs Street
Suite 4000
Tampa, Florida 33602
(813) 225-1655
Counsel for Petitioner

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

TABLE OF CONTENTS

		Page
APPENDIX A –	Opinion of the United States Court of Appeals for the Fifth Circuit	1a
APPENDIX B –	Petition for Rehearing before the United States Court of Appeals for the Fifth Circuit	79a
APPENDIX C –	Petition for Rehearing En Banc before the United States Court of Appeals for the Fifth Circuit	90a
APPENDIX D –	Order of United States Court of Appeals for the Fifth Circuit denying Petition for Rehearing and Suggestion for Rehearing En Banc	106a

APPENDIX A

UNITED STATES of America
Plaintiff-Appellee,

v.

Sam C. MARTINO, Joseph C. Russello and Rolando Gonzalez Rodriguez,
Defendants-Appellants.

UNITED STATES of America
Plaintiff-Appellee,

John Alan HOLT, Rosario Palermo, William H. Brown, a/K/a Bill, John D. Fisher, Robert D. Young, Joseph Macaluso, a/k/a Joe, Frank Scionti, John Nicholas Lostracco, Sam C. Martino, Paul Guarino, Jimmy Farina, Berton B. Chase, a/k/a Bert, Rolando Gonzalez Rodriguez, a/k/a Roland Rodriguez, Joseph D. Lazzara, a/k/a Joe, Joseph C. Russello, a/k/a Joe and Amalia Morgado,
Defendants-Appellants

UNITED STATES of America,
Plaintiff-Appellee,

v.

Sam C. MARTINO
Defendant-Appellant.

Nos. 78-3611, 78-5260 and 78-2606.

United States Court of Appeals,
Fifth Circuit.

June 19, 1981.

Appeals from the United States District Court for the Middle District of Florida.

Before TUTTLE, VANCE and POLITZ, Circuit Judges.

POLITZ, Circuit Judge:

In the decade following enactment of the Racketeer Influenced and Corrupt Organization Act (RICO), 18 U.S.C. §§ 1961 *et seq.*, prosecutions under that Act have begun to follow the recognizable patterns we noted in *United States v. Malatesta,* 583 F.2d 748 (5th Cir. 1978), *aff'd on reh. on other grounds,* 590 F.2d 1379 (5th Cir.) (en banc), *cert. denied,* 440 U.S. 962, 99 S.Ct. 1508, 59 L.Ed.2d 777 (1979). The cases are characterized by lengthy indictments involving multiple defendants charged with diverse criminal activity. In the style of that embryonic tradition this appeal presents sixteen defendants with a combined total of eighty convictions.

The prosecutions we review were commenced by an eighty-three page, thirty-five count indictment, charging twenty-three defendants with mail fraud, RICO conspiracy and RICO substantive violations, specifying sixty-nine overt acts and fifty-six predicate acts of racketeering activity. Three defendants entered guilty pleas. The remaining twenty were jointly tried before a jury in a trial spanning three months. After deliberating three and one-half weeks, the jury found four defendants not guilty and sixteen defendants guilty of one or more counts; all ap-

peal.[1] The supplemented record on appeal includes 8 volumes of pleadings, nearly 100 volumes containing more than 11,000 pages of the testimony of over 200 witnesses, and 5 boxes of exhibits.

The indictment resulted from an investigation of a large number of suspected acts of arson occurring in Tampa and Miami, Florida between July 1973 and April 1976. The indictment charges that a group composed of an insurance adjuster, homeowners, promoters, investors and arsonists associated for the purpose of committing arson with the intent to defraud fire insurers. This association of individuals is characterized as an "enterprise," thus bringing the offenses within the purview of RICO, 18 U.S.C.

---

[1]The following concurrent sentences were imposed: GUARINO – Counts 1 l& 2: 12 years per count, Counts 3-10, 14-20; 5 years per count; SCIONTI – Counts 1 & 2: 12 years per count, Counts 3-6: 5 years per count; FARINA – Counts 1 & 2: 9 years per count; LOSTRACCO – Counts 1 & 2: 9 years per count, Counts 17 & 18: 5 years per count; MARTINO – Counts 1 l& 2: 10 years per count, Counts 14, 15 & 16: 5 years per count; MORGADO – Counts 1 & 2: 9 years per count, Counts 21 & 22: 5 years per count; MACALUSO – Counts 1 & 2: 9 years per count; count, Counts 7, 8, 11, 12 & 13: 5 years per count; LAZZARA – Counts 1 & 2: 10 years per count, Counts 5 & 6: 5 years per count; RODRIGUEZ – Counts 1 & 2: 8 years per count, Counts 7 & 8: 5 years per count; RUSSELLO – Counts 1 & 2: 10 years per count, Counts 28 & 29: 5 years per count; CHASE – Count 1: 6 years; PALERMO – Counts 1 & 2: 8 years per count, Counts 3 & 4: 5 years per count; BROWN – Counts 1 & 2: 8 years per count, Counts 30 & 31: 5 years per count; FISHER – Counts 1 & 2: 8 years per count, Counts 32 & 33: 5 years per count; YOUNG – Counts 1 & 2: 8 years per count, Counts 32 & 33: 5 years per count; HOLT – Counts 1 & 2: 9 years per count, Counts 21 & 22: 5 years per count (Youth Corrections Act).

§ 1962.[2] Count 1, of which the sixteen defendants were convicted, charges a conspiracy to violate RICO, § 1962(d). Count 2, of which fifteen defendants were convicted, charges a substantive violation of RICO, § 1962(c). Counts 3 through 35 charge various defendants with violations of the mail fraud statute, 18 U.S.C. § 1341,[3] and aiding and abetting, 18 U.S.C. § 2,[4] arising out of the fil-

---

[2]18 U.S.C. § 1962 provides in part:

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . .
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

[3]18 U.S.C. § 1341 provides in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon . . . shall be fined not more than $1,000 or imprisoned not more than five years, or both.

[4]18 U.S.C. § 2 provides:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

ing of insurance claims and receipt of payments for the losses resulting from the arsons.

Several issues are presented on appeal; some are common to all appellants, some to more than one, and some apply to only a particular appellant. Each appellant has filed a brief in which the arguments advanced by all other appellants are adopted. We shall, in general, address the common issues first and then review those issues pertinent to only a single appellant.

I. The Setting – The Cast

A summarization of the facts concerning each of the fifteen fires and subsequent insurance claims is set forth in the Appendix. We discuss these facts in somewhat greater detail during consideration of various contentions of insufficient evidence to support the convictions. An overview of the charged conspiracy and enterprise, however, facilitates an understanding of the application of RICO, particularly because the degree of involvement varied with each defendant.

The arson ring began operating in 1973 when Paul Guarino and Frank Scionti hired Willie Noriega as their principal "torch." At first the arsonists only burned buildings already owned by those associated with the ring. Following a burning, the building owner filed an inflated proof of loss statement and collected the insurance proceeds from which his co-conspirators were paid. Later, ring members bought buildings suitable for burning, secured insurance in excess of value and, after a burning, made claims for the loss and divided the proceeds.

Different roles were played by those defendants comprising the enterprise. Joseph J. Carter was the insurance

adjuster who, with knowledge of the arson, processed fire loss claims. In return for this service and for guiding others to insurance agencies where fire insurance could be secured in excess of the value of substandard property, Carter received a portion of the insurance proceeds. He pled guilty to nineteen counts and testified as a government witness.

Willie Noriega, the primary arsonist, pled guilty to all 35 counts and testified as the key government witness. Noriega was assisted in the "torching" by Paul Guarino, Frank Scionti, Joseph Macaluso and Victor Arrigo, who also testified as a government witness after pleading guilty to seven counts.

Sam C. Martino and Berton B. Chase provided financing for some of those who bought property targeted to be burned. Martino was in the real estate business and, in addition to arranging loans, located substandard property for use in the scheme. The defendants who acquired or aided in the acquisition of targeted property, secured excessive insurance and collected insurance payments included Carter, Guarino, Martino, Noriega, Macaluso, Amalia Morgado, John D. Fisher and Robert D. Young.

Several defendants already owned premises, mostly substandard, covered by fire insurance. They needed only the services of the arsonists and, in some instances, claims assistance. This group included Jimmy Farina, Joseph D. Lazzara, Rolando Gonzalez Rodriguez, Joseph C. Russello, John Alan Holt, Rosario Palermo and William H. Brown.

Finally, there were those who served as the contacts or go-betweens for persons who owned property they wished to have burned, or who wanted to acquire property for that purpose, and the arsonists. These "marketers" or

"brokers" included Carter, Guarino, Scionti, Morgado, Martino and John Nicholas Lostracco.

With the basic structure of the "enterprise" and the roles of the various defendants in perspective, we now consider the assignments of error.

A. Constitutionality of RICO

The RICO statute is challenged on five grounds, that, in the main, have been considered and dismissed in earlier cases. It is contended that RICO (1) punishes associational status, (2) does not apply to enterprises engaged solely in criminal activity, (3) is unconstitutionally vague, (4) operates *ex post facto*, and (5) is contrary to the Ninth and Tenth Amendments.

[1] In *United States v. Elliott,* 571 F.2d 880 (5th Cir.), *cert. denied,* 439 U.S. 953, 99 S.Ct. 349, 58 L.Ed.2d 344 (1978), we rejected the argument that RICO unconstitutionally punishes associational status; "its proscriptions are directed against conduct, not status." *Id.* at 903. Also in *Elliott,* and recently reaffirmed in *United States v. Diecidue,* 603 F.2d 535 (5th Cir. 1979), *cert. denied,* 445 U.S. 946, 446 U.S. 912, 100 S.Ct. 1345, 100 S.Ct. 1842, 63 L.Ed.2d 781, 64 L.Ed.2d 266 (1980), we held RICO applicable to a group whose sole purpose was to engage in illegal activities. Appellants request a reconsideration of that position in light of contrary opinions from other circuits.[5] We are aware of the criticisms leveled at our deci-

[5] *See, e.g., United States v. Turkette,* 632 F.2d 896 (1st Cir. 1980), *cert. granted,* ____U.S.____,101 S.Ct. 938, 67 L.Ed. 2d____(U.S. 1981) (No. 80-808), argued April 27, 1981, 49 U.S L.W. 3831; *United States v. Anderson,* 626 F.2d 1358 (8th Cir. 1980).

sions and we recognize that appellants' position is arguably meritorius. What appellants request, however, is not a course available to this panel but is a prerogative only of our court sitting *en banc.*

[2] Appellants' third contention, that RICO is unconstitutionally vague, was rejected in *United States v. Hawes,* 529 F.2d 472, 479 (5th Cir. 1976), in which we held that a person of average intelligence, upon reading the statute with the aid of relevant definitional provisions, "could not help but realize that they would be criminally liable for participating in 'any enterprise,' including their own, 'through a pattern of racketeering activity.'"

[3] Whether RICO is unconstitutional as an *ex post facto* law because of judicial enlargement is a question never before considered by us. The defendants argue that by applying RICO to illegitimate as well as legitimate enterprises, we have deviated so far from an average person's understanding of RICO that an *ex post facto* effect results. It is not every judicial expansion of statutory construction that creates an *ex post facto* law; rather, it is only those which are "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." *Bouie v. City of Columbia,* 378 U.S. 347, 354, 84 S.Ct. 1697, 1703, 12 L.Ed.2d 894 (1964), *quoting* Hall, *General Principles of Criminal Law* at 61 (2d ed.1960).

[4] "Enterprise" is defined in § 1961 to include "any . . . group of individuals associated in fact although not a legal entity." This language is broad and nonrestrictive. It is not unreasonable to suggest that this language encompasses groups associated for the purpose of committing arson with the intent to defraud. This general, non-specific language negates the contention that expansive judicial interpretation is either unexpected or indefen-

sible. We do not find that the interpretation given to RICO by this court has so deviated from what would be an average person's understanding that an *ex post facto* effect has occurred. This contention of constitutional abrogation is infirm.

[5] We likewise reject the proposition that RICO violates the Ninth and Tenth Amendments. Appellants assert that RICO intrudes upon state sovereignty because the statute fails to require that the acts of racketeering *per se* affect interstate commerce. This argument ignores the essence of RICO which proscribes the furthering of the enterprise, not the predicate acts. The predicate acts are, in turn, proscribed by existing, enumerated state or federal laws. *United States v. Bright,* 630 F.2d 804 (5th Cir. 1980). Appellants were not convicted of the state offense of arson; they were all (except Chase) convicted of the federal offenses of mail fraud and of conspiring to participate and participating in the affairs of an enterprise affecting interstate commerce.

We conclude and hold that the five grounds upon which appellants challenge the constitutionality of RICO are without merit.

B. The Indictment

[6] The indictment is challenged on several grounds, including insufficiency, duplicity and misapplication of RICO. It is also contended that there is a variance between the indictment and the evidence. First, it is argued that the required effect of interstate commerce is not sufficiently alleged. Like the indictment in *Diecidue, supra,* the instant indictment tracks the language of the statute as to the effect on interstate commerce. The indictment further

charges that the defendants "did knowingly and willfully place and cause to be placed . . . in authorized depositories for mail matter to be sent and delivered according to the directions thereon by the Postal Service of the United States." The effect on interstate commerce is sufficiently alleged.

[7] Appellants contend that Count 1 charges multiple conspiracies and therefore the indictment is duplicitous. Appellants insist that each fire listed constitutes a separate conspiracy. To the contrary, "[t]he allegations addressed to the various substantive offenses committed as part of the conspiracy are merely descriptive of the single overall agreement." *Diecidue,* 603 F.2d at 546. The count is not duplicitous; it charges a single conspiracy involving several acts.

[8] It is next contended that the indictment is fatally defective because the appellants are charged under the wrong subsection of § 1962. It is argued that inasmuch as they are charged with associating with the other defendants, as the enterprise involved, they were mistakenly charged with violating subsection (c), rather than (b). This argument founders on the shoals of the language of RICO. Subsection (b) proscribes acquiring or maintaining an interest or control in an enterprise through a pattern of racketeering activity; subsection (c) makes it unlawful for one associated with or employed by the enterprise to participate in the conduct of its affairs through a pattern of racketeering activity. Appellants insist that § 1962(c) applies only to those who manage the enterprise, *i.e.,* the top coterie. We disagree. Section 1962(c) makes it unlawful to "conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs." The word "conduct" is neither illusive nor mysterious, nor is its use unique to RICO. It is found in other statutes including, *inter alia,* 18

U.S.C. § 1955 which makes it a crime for one to conduct an illegal gambling business. In *United States v. Tucker,* 638 F.2d 1292 (5th Cir. 1981), we held that a waitress serving drinks to customers engaged in gambling conducts an illegal gambling business within the intendment of 18 U.S.C. § 1955. We concluded in *Tucker* that the word "conducts" simply means the performance of activities necessary or helpful to the operation of the enterprise.

[9] Finally, appellants cite *Kotteakos v. United States,* 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946), attacking the indictment on the ground that it alleges only one conspiracy while the government's evidence establishes multiple conspiracies. They contend that this results in a variance that substantially prejudiced their rights contrary to *Kotteakos.* We disagree. This argument has been considered in *Elliott, Diecidue,* and *Bright, supra,* and in *United States v. L'Hoste,* 609 F.2d 796 (5th Cir.), *cert. denied,* ____ U.S. ____, 101 S.Ct. 104, 66 L.Ed.2d 39 (1980). In *L'Hoste* we resolved this issue adverse to the appellants, stating: "If the government proves multiple conspiracies and a defendant's involvement in at least one of them, then clearly there is no variance affecting that defendant's substantial rights." 609 F.2d at 801, *citing United States v. Wayman,* 510 F.2d 1020 (5th Cir.), *cert. denied,* 423 U.S. 846, 96 S.Ct. 84, 46 L.Ed.2d 67 (1975). Following the path of *L'Hoste,* we find no variance affecting the appellants' substantial rights.

We find no merit in any of appellants' challenges to the indictment.

C. Double Jeopardy

[10] Appellants submit that the government should have been forced to elect between Counts 1 and 2 because prosecution on both does violence to the double jeopardy clause which "protects against multiple punishments for the same offense." *United States v. Smith,* 574 F.2d 308, 309 (5th Cir.), *cert. denied,* 439 U.S. 931, 99 S.Ct. 321, 58 L.Ed.2d 325 (1978), *quoting North Carolina v. Pearce,* 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969). The "same offense" test may be simply stated: If there is any difference in the elements to be proven, the two instances are not the same offense. *Blockburger v. United States,* 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). Application of the rubric to RICO violations requires pause and reflection because of the nature of the RICO statute. We bear in mind that under *Blockburger* we must determine if one offense requires proof of a fact not required by the other.

[11] Prosecution of RICO substantive and conspiracy charges expectedly involves considerable overlap in the evidence, especially where the enterprise exists as a consequence of persons associating and committing acts making up a pattern of racketeering activity. Such overlap does not occasion an automatic invocation of double jeopardy. *Iannelli v. United States,* 420 U.S. 770, 95 S.Ct. 1284, 43 L.Ed.2d 616 (1975).

[12] A RICO substantive charge requires proof of the existence of an enterprise which affects interstate commerce and that the defendant participated in the conduct of the enterprise's affairs by committing at least two of the designated acts of racketeering activity. A RICO conspiracy charge requires the additional element of agreement; the defendant must have "objectively manifested an

agreement to participate, directly or indirectly, in the affairs of an enterprise *through the commission of two or more predicate crimes." Elliott,* 571 F.2d at 903 (emphasis in original). The Elliott court also stated that the agreement involved in a RICO conspiracy must include the vital element of agreeing to commit the predicate acts. Upon proof of the commission of racketeering activity, "the inference of an agreement to do so is unmistakable." *Id.* This statement has been interpreted to cast a shadow across the sun because it leads to the argument that the distinguishing element of subsection (d) (the agreement to violate) evaporates because proof of the substantive charge automatically includes proof of a conspiracy. *United States v. Anderson,* 626 F.2d 1358, 1368-69 n. 18 (8th Cir. 1980); Note, *Racketeers, Congress and the Courts: An Analysis of RICO,* 65 *Iowa L.Rev.* 837, 879 (1980). If the only evidence offered from which a jury can infer an agreement to participate in the enterprise is evidence of engaging in a pattern of racketeering activity, the requisites for applying the double jeopardy rule would appear to exist.

[13] Albeit persuasive, this argument glosses over the essential teaching of *Blockburger* and obfuscates the inquiry whether the two counts charge the same offense. The aegis of the double jeopardy clause of the Fifth Amendment is not invoked merely by showing that a jury had the opportunity to convict on two counts by drawing appropriate inferences from the same evidence. "[T]he *Blockburger* test looks *not* to the evidence adduced at trial but focuses on the elements of the offense charged." *United States v. Cowart,* 595 F.2d 1023, 1029 (5th Cir. 1979). That the distinguishing element can be proven by the same evidence as that used to convict on another count does not bring the offenses within the context of double

jeopardy. *United States v. Dunbar,* 591 F.2d 1190 (5th Cir. 1979), *aff'd on reh. on other grounds,* 611 F.2d 985 (5th Cir. 1980) (en banc). The RICO substantive and RICO conspiracy convictions are not vitiated by the double jeopardy clause.

D. Pre-trial Matters

Appellants request our review of certain pre-trial matters they contend constitute reversible error. These include motions for bill of particulars, requests for *Brady* material and the medical examination into Willie Noriega's competence to testify.

[14-16] It is argued that because of the complexity of the case, the motions for bill of particulars should have been granted to prevent confusion which hindered the defendants from understanding the nature of the charges against them. Action on a motion for bill of particulars is committed to the sound discretion of the trial judge. We may reverse a ruling denying the motion only if a defendant demonstrates that he was "actually surprised at trial and thus incurred prejudice to his substantial rights by the denial." *Diecidue,* 603 F.2d at 563. No such demonstration has been made to this court; there has been no abuse of discretion and no reversible error exists.

Appellants contend that the government failed to comply with the disclosure requirements of *Brady v. Maryland,* 373 U.S. 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and its progeny. They specifically call our attention to inconsistent statements made prior to and during trial by a government witness and a letter sent to the U.S. Attorney by a psychiatric expert for the government. The alleged inconsistent statements were made by a witness with respect

to a 1972 fire in which two arsonists died.[6] In her first statement to the police shortly after the fire, the witness said that Robert Bradwell (one of the arsonists who died) had told her that he had been robbed and set on fire by unknown persons. At trial, she testified that Bradwell had asked her to make that statement, but that he also told her what really happened: he had burned while he, Lester Oates and Paul Guarino set fire to the Kakeland Bakery.

[17-19] As impeaching evidence, the prior inconsistent statement would fall within disclosure requirements because *Brady* encompasses impeachment evidence as well as evidence favorable to the accused on the issue of guilt. *United States v. Auten,* 632 F.2d 478 (5th Cir. 1980). Failure of the government to disclose information useful only for impeachment, however, mandates reversal only if defendants demonstrate that the undisclosed evidence probably would have resulted in acquittal. *United States v. Anderson,* 574 F.2d 1347 (1978). It cannot be seriously contended that this one statement made by one of the more than one hundred government witnesses would probably have resulted in acquittal. The claim is devoid of merit.

[20, 21] The remaining asserted *Brady* violation concerns a letter written to the U.S. Attorney by the psychiatrist who served as the government's witness on rebuttal. In the letter the psychiatrist opined that Willie Noriega was not psychotic in 1963 but that he had self-induced psychotic symptoms by using drugs in an attempt to avoid prosecution for arson. The letter was given to the

---

[6]This fire was not the subject of a mail fraud count, but was named as an overt act in Count 1.

defendants after the doctor testified, consistent with the requirements of the Jencks Act, 18 U.S.C. § 3500. This disclosure expunged any earlier error because "when alleged *Brady* material is contained in Jencks Act material, disclosure is generally timely if the government complies with the Jencks Act." *Anderson,* 574 F.2d at 1352. This *Brady* claim is also without merit.

Pursuant to a defense request prior to trial, the trial court exercised its discretion and appointed an expert to conduct a competency examination of Noriega. *See United States v. Roach,* 590 F.2d 181 (5th Cir. 1979); *United States v. Jackson,* 576 F.2d 46 (5th Cir. 1978). The psychiatrist was instructed to examine Noriega and formulate an opinion about his present mental state and whether he was then able to differentiate reality from fantasy and accurately to remember and relate events that occurred during the prior five years. The expert determined Noriega was competent to testify at trial. Appellants insist the court erred in not requiring the psychiatrist also to determine Noriega's mental condition during the time period of the alleged offenses.

[22, 23] Whether a witness is competent to testify is a threshold question of law to be answered by the judge. *Roach, supra;* Wharton's Criminal Evidence, Vol. 11 § 377 (13th ed. C. Torcia 1972). It is left to the jury to assess a witness's credibility and the weight to be accorded his testimony. Because a witness's mental state during the period about which he proposes to testify is a matter which affects his credibility, it is a jury determination and thus not germane to competency to testify. We posted this trial in *United States v. Partin,* 493 F.2d 750, 762 (5th Cir. 1974), *cert. denied,* 434 U.S. 903, 98 S.Ct. 298, 54 L.Ed.2d 189 (1977):

> The readily apparent principle is that the jury should, within reason, be informed of all the matters affecting a witness's credibility to aid in their determination of the truth . . . . It is just as reasonable that a jury be informed of a witness's mental incapacity at a time about which he proposes to testify as it would be for the jury to know that he then suffered an impairment of sight or hearing. It all goes to the ability to comprehend, know, and correctly relate the truth.

See also Greene v. Wainwright, 634 F.2d 272 (5th Cir. 1981).

[24] In the case at bar the trial judge was not obligated to ask the court-appointed expert to determine Noriega's mental capacity at the time of the alleged offenses as well as his competence to testify. It would not have been error had the trial judge done so, for this would have been an additional item of evidence for the jury to consider in making its credibility assessment. Nevertheless, to decline to grant this defense request does not constitute reversible error. The defendants had ample opportunity to show Noriega's mental condition at the time about which he testified. Defense experts testified, as did acquaintances of Noriega who knew him during the arson spree. Furthermore, the jury was properly instructed to consider evidence of a witness's mental condition at the time of the incidents in judging the credibility of the witness and the weight to be given to that witness's testimony.

E. Joint Trial versus Severance

[25-27] Each appellant alleges prejudice by the joinder of his trial with the other defendants and that the trial judge committed reversible error in failing to grant the

repeated error in failing to grant the repeated motions for severance. Joinder was proper under Rule § 8(b), Fed. R.Crim.P. *See Bright, supra.* Accordingly, defendants must rely on Rule 14, Fed.R.Crim.P., which permits severance if a defendant is prejudiced by the joinder.[7] On a Rule 14 severance motion, the trial judge is required to weigh the prejudice inherent in a joint trial in light of the realities of judicial economy and to sever defendants as the needs of justice dictate. *United States v. McLaurin,* 557 F.2d 1064 (5th Cir. 1977), *cert. denied,* 434 U.S. 1020, 98 S.Ct. 743, 54 L.Ed.2d 767 (1978). The denial of a motion to sever is reversible only for abuse of discretion. An appellant's burden of showing prejudice is onerous; the general test is:

> whether under all the circumstances of the particular case, as a practical matter, it is within the capacity of the jurors to follow the court's admonitory instructions and accordingly to collate and appraise the independent evidence against each defendant solely upon that defendant's own acts, statements and conduct. In sum, can the jury keep separate the evidence that is relevant to each defendant and render a fair and impartial verdict as to him? if so, though the task be difficult, severance should not be granted.

Peterson v. United States, 344 F.2d 419, 422 (5th Cir. 1965).

---

[7]Rule 14, Fed.R.Crim.P., provides in pertinent part:

> If it appears that a defendant . . . is prejudiced by a joinder of offenses or of defendants in an indictment . . . or by such joinder for trial together, the court may . . . grant a severance of defendants.

To buttress their claim of prejudice, appellants submit an impressive litany: there were twenty defendants, most with Spanish or Italian surnames; thirty-five counts (only thirty-three remained after Noriega pled guilty) were charged, but many of the defendants were charged in only a few of the counts; the trial lasted three months; the jury heard over 200 witnesses, some testifying against many defendants, others testifying against only a few; and there were nineteen defense counsel and three prosecuting attorneys, all within the confines of a modest sized courtroom. Appellants argue that the totality of these facts created a "circus" atmosphere rather than that which should prevail for a serious criminal trial.

[28] We are keenly aware that joint trials, especially those involving numerous defendants and multiple charges, carry substantial risks of manifest unfairness. We do not encourage trials en masse. We must, however, reckon with the realities of this type prosecution. The Constitution does not guarantee a trial free from the burdens that inevitably accompany such a trial; rather, it requires that the potential for transferability of guilt be minimized to the extent possible in order to "individualize each defendant in his relation to the mass." *Kotteakos, supra; United States v. LeCompte,* 599 F.2d 81 (5th Cir. 1979), *cert. denied,* 445 U.S. 927, 100 S.Ct. 1313, 63 L.Ed.2d 759 (1980); *Elliott, supra.* We recently confronted this same issue in *United States v. Morrow,* 537 F.2d 120, 136 (5th Cir. 1976), *cert. denied,* 430 U.S. 956, 97 S.Ct. 1602, 51 L.Ed.2d 806 (1977), and our discussion relative to severance is appropriate here:

> In reviewing a claim of undue complexity and confusion, an appellate court looks to the totality of the circumstances in striking a balance be-

> tween the interest in judicial economy and the need to protect the rights of the individual defendant. A joint trial of twenty-three defendants, charged with conspiracy and numerous substantive counts, clearly raised the possibility that the jury might cumulate the evidence introduced by the Government on all counts and against all defendants to find guilty a defendant whose connection with the conspiracy was at best marginal. The pernicious effect of cumulation, however, is best avoided by precise instructions to the jury on the admissibility and proper uses of the evidence introduced by the Government. The remedy of severance is justified only if the prejudice flowing from a joint trial is clearly beyond the curative powers of a cautionary instruction. Where the Government charges a single conspiracy, as it did here, much of the evidence introduced ultimately bears, at least indirectly, on the agreement of the co-conspirators. Once the Government has satisfactorily established the existence of the conspiracy, the same evidence used to convict a particular defendant is admissible against all co-defendants shown to be members of the conspiracy. Given this state of affairs, the interest in judicial economy understandably exerts strong pressures in favor of a joint trial.

In the case *sub judice* Judge Hodges faced a formidable task. He conducted the trial with great skill and with a judicial professionalism much to be admired. He minimized the potential transference of guilt with every tool at his command. He gave careful, detailed instructions about the elements of RICO conspiracy and RICO substantive charges, doing so, as appropriate, as they related to each

defendant. Proper uses of evidence were explained. Judge Hodges met the burden of avoiding the "pernicious effect of cumulation."

[29] Notwithstanding the very skillful presiding of the trial judge, appellants argue that the totality of the circumstances were such that a jury had to be confused and unable to individualize the verdicts simply because of the volume of evidence which inundated them. We knowledge the validity of this concern and, were it not for the manner in which Judge Hodges handled this obviously difficult trial and our review of the verdicts in light of the record, we might be prone to agree with appellants. We finally resolve this contention by "look[ing] to the verdict. Convictions will invariably be sustained if it may be inferred from the verdict that the jury 'meticulously sifted the evidence' as where it acquits on certain counts." *Tillman v. United States,* 406 F.2d 930, 936 (5th Cir.), *vacated in part on other grounds,* 395 U.S. 830, 89 S.Ct. 2143, 23 L.Ed.2d 742 (1969), *quoting* 8 Moore, *Federal Practice* ¶ 14.04[1], at 14-15 (2d ed. 1968). It is apparent from the verdicts reached that the jury, after more than three weeks of deliberation, did "meticulously sift" the evidence. Four defendants were acquitted on all charges; eight others were convicted on some charges but acquitted on others. Although coming close, defendants have not met the burden imposed to compel our finding of an abuse of discretion.[8]

---

[8]We are mindful of our recent decision in *United States v. Diaz-Munoz,* 632 F.2d 1330 (5th Cir. 1980), where we found that the jury had not been able to evaluate each defendant's position properly. That case is not controlling. In *Diaz-Munoz* we found that misjoinder had occurred; in the case at bar joinder was proper. Furthermore, in *Diaz-Munoz* the jury deliberated for less than three hours (including lunch); in the case we review the jury deliberated over three weeks.

F. Trial Errors

Appellants allege reversible error because of prosecutorial misconduct, misconduct of defense counsel and various other trial errors. They maintain that whereas the alleged errors singularly might not be sufficient to mandate reversals, their cumulative effect denied appellants a fair trial, warranting reversals of the convictions. After examining each error assigned, we are compelled to disagree.

1. Jencks Act

[30, 31] Appellants condemn the manner in which the government conducted interviews with its witnesses ostensibly to avoid producing Jencks Act material under 18 U.S.C. § 3500,[9] calling it "the most abusive conduct by the government." It became evident during trial that government attorneys and FBI agents held several interviews with potential witnesses but no written or recorded statements were taken. Appellants argue that the government purposely failed to record the interviews because they wanted to hinder the defense and that such tactics by the prosecution should not be tolerated.

---

[9]Under the Jencks Act, the government is required to produce any statement of a witness, after that witness testifies and upon motion of the defendant, that is in the possession of the United States and relates to the subject matter to which the witness testifies. "Statement," within the context of this Act, means one that is written, transcribed, or stenographically, mechanically or electronically recorded and is a substantially verbatim recital of an oral statement made by the witness and recorded contemporaneously with the making of such oral statement. It is undisputed that notes taken by an interviewer during an interview with the witness do not qualify as a statement under the Jencks Act. *United States v. Cuesta,* 597 F.2d 903 (5th Cir. 1979); *United States v. Scaglione,* 446 F.2d 182 (5th Cir.), *cert. denied,* 404 U.S. 941, 92 S.Ct. 284, 30 L.Ed.2d 254 (1971).

[32] No requirement has been brought to our attention that all interviews must be recorded or that interview notes must be reduced to writing and signed or otherwise approved by the witness. We cannot presume that the prosecutor acted in bad faith by failing to reduce his notes to statement form. That interviewers usually take notes rather than verbatim statements was noted by Justice Powell in his concurrence in *Goldberg v. United States*, 425 U.S. 94, 122 n. 9, 96 S.Ct. 1338, 1345 n. 9, 47 L.Ed.2d 603 (1976), wherein he stated;

> Indeed, only the foolish or exceptionally talented counsel will depend solely on his memory when preparing for the examination of a key witness. But the fact that counsel usually will take notes does not mean that the notes often will be "statements." Counsel rarely take down verbatim what witnesses say in these preparatory conferences. Consequently, prosecutors' notes may be expected to meet the requirements of [18 U.S.C. § 3500] (3)(2) very infrequently. (Citations omitted.) The notes taken will vary from cryptic "memory jogs" to full summaries of the anticipated testimony.

Appellants' claim of error on this issue is without merit.

2. Opening Statements

> Comments made during opening statements by two of the twenty-two lawyers involved in this trial have been singled out and categorized as highly prejudicial and sufficient to warrant reversal. One statement is attributed to the prosecutor who informed the jury that Noriega and his family had been relocated to a different part of the country as a result of his cooperation with

> the government and that Noriega had received approximately $34,000 from the government. Defendants contend this was an improper reference to the federal Witness Protection Program and was a suggestion to the jury that the defendants were a source of danger to Noriega.

Reference to a witness's participation in the Witness Protection Program was also at issue in the appeal after remand in *United States v. Partin,* 552 F.2d 621 (5th Cir.), *cert. denied,* 434 U.S. 903, 98 S.Ct. 298, 54 L.Ed.2d 189 (1977). In *Partin* we recognized that disclosure of such participation is a delicate matter because the jury might infer that the defendant is a threat to the witness or his family. We made clear that the prosecution may not exploit the possibility of such an inference. At the same time, however, we recognized that the defendant should be permitted to show that a witness, while in the program, received substantial benefits. Such information is relevant in the ultimate determination of the witness's credibility.

[33, 34] Anticipating that Noriega's receipt of benefits from the government would be used to impeach his credibility, the prosecutor chose to inform the jury of this in his opening statement. This information is admissible and we cannot say that the prosecutor's brief comment at the beginning of trial was an unfair exploitation.[10]

---

[10]Defendants also complain about various comments made by the prosecutor during closing argument. Specifically, they point to remarks about "defense lawyer tactics," the "millionaire defense," the individual victims of the arsons, and his response to defendant Chase's argument by saying "the government's evidence has been truthful." We do not find that such comments meet the test for a new trial as again recently stated in *United States v. Lichenstein,* 610 F.2d 1272, 1281 (5th Cir.), *cert. denied,* 447 U.S. 907, 100 S.Ct. 2991, 64 L.Ed.2d 856 (1980), *quoting United States v. Blevins,* 555 F.2d 1236, 1240 (5th

[35] The remaining comment during opening statements to which defendants assign error was made by counsel for co-defendant Lostracco who commented that his client, presented as entirely innocent of the charges brought against him, was forced as a result of the indictment to sit down with a "bunch of gangsters." Defendants argue that this comment was highly prejudicial, especially in light of the surnames of most of the defendants. While we do not condone such tactics or language by any counsel in any stage of a trial, we are not persuaded that it was so prejudicial as to mandate reversals. The statement in question was made at the beginning of a lengthy trial and was not repeated. After viewing the entire record, we are not convinced that the improper statement influenced the jury at all. We find the error harmless.

4. Assertion of Fifth Amendment Privilege

[37, 38] Another argument raised by appellants was similarly rejected in *Diecidue,* a case in which Willie Noriega also testified as a government witness. In both trials, Noriega chose to exercise his Fifth Amendment right against self-incrimination. In both appeals the defendants have argued that Noriega's decision to exercise his Fifth Amendment right denied them the right of confrontation. The questions which prompted assertion of the

---

Cir. 1977), *cert. denied,* 434 U.S. 1016, 98 S.Ct. 733, 54 L.Ed.2d 761 (1978): "[p]rosecutorial misconduct in the form of improper comments . . . 'must be so pronounced and persistent that it permeates the entire atmosphere of the trial.'" Furthermore, the prosecutor's comment on rebuttal that his evidence was "truthful" was even present what amounts to a bolstering argument if it is specifically done in rebuttal to assertions made by defense counsel in order to remove any stigma cast upon him or his witnesses." *United States v. Dorr,* 636 F.2d 117, 120 (5th Cir. 1981).

Fifth Amendment privilege were almost identical in both proceedings. In *Diecidue* we noted that where a witness legitimately invokes the privilege, the testimony is to be struck only if the defendants' resultant inability to complete their questioning creates a substantial risk of prejudice. Generally, it is only when a witness refuses to answer questions on direct, as opposed to collateral issues, that his testimony is excised. The questions asked of Noriega were aimed at undermining his credibility. His credibility had already been the subject of intense attack during cross-examination. Therefore, as in *Diecidue,* "the responses illicited by defendants' questions would have been mere cumulative evidence of credibility." 603 F.2d at 552. The trial judge's refusal to strike the responses was not erroneous. This same rationale applies to defendants' argument relating to witness Joseph Carter's decision to invoke his Fifth Amendment privilege.[11]

5. Noriega's Competence to Testify

[39, 40] Noriega's competence to testify has been attacked by several defendants who contend that Noriega was incompetent and that his testimony was incredible as matter of law. As discussed earlier, whether a witness is competent to testify is a question of law for the trial judge. Unless an abuse of discretion is demonstrated, the trial judge's decision will not be disturbed. *United States v.*

---

[11]Defendants also claim that their right of cross-examination was impaired when Noriega asserted his attorney-client privilege in response to the question whether he had asked his attorney to work with the U.S. Attorney on his behalf. This claim is frivolous. The response was given only once during extensive examination. Noriega was subsequently asked whether he had sought help from the U.S. Attorney and he answered affirmatively. No possible harm resulted from his initial assertion of the privilege.

Killian, 524 F.2d 1268 (5th Cir. 1975), *cert. denied,* 425 U.S. 935, 96 S.Ct. 1667, 48 L.Ed.2d 177 (1976). No such demonstration has been made.

6. **Admissibility of Plea Agreement**

Appellants object to the introduction into evidence of Noriega's plea agreement. Complaints are specifically made with reference to portions of the plea agreement that mention needed protection for Noriega and his family and his promise to testify "truthfully." Appellants concede that they cross-examine Noriega extensively about his plea agreement; nevertheless, they allege that the areas of the agreement to which they object were not covered in their cross-examination.

[41-43] The possibility that the jury would infer that the defendants were the source of danger to Noriega was eliminated by the trial judge's comments to the jury that the source of the threat was not the defendants in the instant case, but rather the defendants in another case in which Noriega had testified. As relates to the issue of the threat, it was not error to allow the jury to view the agreement between Noriega & the government, nor did the plea agreement constitute an impermissible affirmation or bolstering by the prosecutor of the credibility of a government witness. The statement in the plea agreement that Noriega promised to testify "truthfully" does not constitute error-laden vouching for the credibility of a government witness. *United States v. Arroyo-Angulo,* 580 F.2d 1137 (2d Cir.), *cert. denied,* 439 U.S. 913, 99 S.Ct. 285, 58 L.Ed.2d 260, and 439 U.S. 1005, 99 S.Ct. 618, 58 L.Ed.2d 681 (1978), and 439 U.S. 1131, 99 S.Ct. 1052, 59 L.Ed.2d 93 (1979); *United States v. Isaacs,* 493 F.2d 1124 (7th Cir. 1974). As we stated in *United States v. Rosson,* 441 F.2d 242, 244 (5th Cir. 1971): "If the defense relies upon the ex-

istence of the plea bargain to attack the credibility of the witness, it is not then entitled to preclude the jury from being apprised of additional matters relevant to the bargain so as to leave an incorrect inferenced that the witness has made a better bargain for himself . . . than in fact he has made." The court properly admitted the plea bargain agreement into evidence; appellants' arguments to the contrary are rejected.[12]

7. References to Polygraph Tests

[44,45] During cross-examination, Noriega made reference to his willingness to take a lie detector test.[13] The defendants argue that the comment was so prejudicial that a mistrial should have been granted. It is currently the law in this circuit that the results of a polygraph test are inadmissible in evidence. *United States v. Clark,* 598 F.2d 994 (5th Cir. 1979). Because the jury is not allowed to know the results of the test, appellants insist that to permit a

---

[12]Appellants also contend that the document was inadmissible as hearsay. This argument misses the mark. The document was not introduced to establish the truth of the factual assertions contained therein; rather, it was merely introduced to establish the fact of its existence and contents. As such, it was not hearsay.

[13]The comment arose during the following exchange:

Q. (By defense attorney Mr. Cohen) Now, do you know, sir, that you like to do a good job as a witness in this case for the government; do you not?

A. I'm testifying to the truth, sir.

Q. Would you like to see the Government win this case?

A. It doesn't make any difference to me.

Q. You don't care; is that your testimony?

A. My testimony is I am here to testify to the truth, and I am willing to take a lie detector test if your client is.

witness to testify concerning his willingness to take the test constitutes improper bolstering. Although we agree that Noriega's response to the question was improper, we do not agree that it was prejudicial to the point of measurably affecting the jury's verdicts. The trial judge not only cautioned the jury twice to disregard Noriega's comment, he also told them why such an instruction was being given. He explained that polygraph tests have not yet achieved sufficient scientific reliability to be admissible in evidence. If there was any prejudice to the defendants, such prejudice was cured by the careful manner in which the trial judge handled the situation[14]

8. Comment on Defendants' Failure to Testify

Appellants suggest that an exchange that occurred after Noriega's response as set forth in footnote 13, was grounds for a mistrial. They claim that the prosecutor made an improper reference to the decision of some the defendants not to testify. That reference ostensibly occurred during the following exchange:

THE COURT: Well, I will instruct the jury to altogether disregard that last part of the witness's answer.

MR. COHEN: Judge, I would like to be heard on that outside the presence of the jury. I think—

THE COURT: Well, you may.

---

[14]There was another reference made to the polygraph test by government witness James Earl Wright. Under cross-examination concerning a pending state charge against him, Wright said that he really was not concerned about the charges because he knew he could beat those charges by taking a polygraph test. The reference had nothing to do with the charges that were the subject of the trial. No prejudice occurred as a result of than fleeting comment.

MR. COHEN: I think that my client will be more than willing to enter that sort of stipulation.

MR. HOGUE: (The Prosecutor) Objection to counsel testifying. If he wants to take the stand he may.

At this point the judge excused the jury and held a discussion with counsel.

[46] The comment by the prosecutor that "If he wants to take the stand he may," immediately followed the prosecutor's objection to defense counsel testifying. It strains credulity to believe that the prosecutor was referring to a defendant. To accept the appellants' argument we would have to view that statement out of the context in which it was said, a clearly impermissible approach. *See United States v. Austin,* 585 F.2d 1271 (5th Cir. 1978). Furthermore, the statement was not of "such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." *United States v. White,* 444 F.2d 1274, 1278 (5th Cir.), *cert. denied,* 404 U.S. 949, 92 S.Ct. 300, 30 L.Ed.2d 266 (1971). It was not a reversible error reference to the defendants' election not to testify.

9. Miscellaneous Improper Comments

[47, 48] Various responses given by witnesses during the trial are challenged as being so prejudicial that they denied the defendants a fair trial. Our review of the record leads to the conclusion that these responses did not result in prejudice to the defendants. In reaching this conclusion we follow the guidelines expressed in *United States v. Hyde,* 448 F.2d 815, 847 (5th Cir. 1971), *cert. denied,* 404 U.S. 1058, 92 S.Ct. 736, 30 L.Ed.2d 745 (1972): "Allegedly improper statements should not be viewed in the abstract. The question is what impact they had in the con-

text of the particular trial in terms of their relevance and the quantity of untainted evidence in the case." As we noted earlier, this trial lasted over three months and the record includes more than 11,000 pages of testimony. We cannot say that the four or five responses complained of by the defendants measureably affected the jury in any way. This complaint is likewise without merit.

10. Exclusion of Hearsay Testimony

Lazzara argues that certain hearsay testimony was wrongfully stricken from the record, resulting in prejudicial and reversible error. We do not agree. The hearsay testimony was elicited from witness Ruth McElroy the mother of hiram McElroy who was working for Lazzara at a Miami laundromat when it burned. Noriega testified that, as part of the scheme, he took Hiram McElroy to the bus station in Miami and then returned to the laundromat to set the fire. Noriega admitted responsibility for the fire, saying he set it at Lazzara's request. Hiram McElroy, on the other hand, allegedly told his mother that he was sleeping in the laundromat when the fire broke out and that earlier he had been cooking on a hot plate and may have left it on. McElroy died prior to trial and Lazzara tried to get his statement into evidence as an exception to the hearsay rule under Rule 804(b)(3), Fed.R.Evid. The trial judge ruled the testimony was inadmissible hearsay. Rule 804 provides in part:

> (a) Definition of unavailability.– 'Unavailability as a witness' includes situations in which the declarant–
>
> * * * * * *
>
> (4) is unable to be present or to testify . . . because of death . . . .

> (b) Hearsay exceptions.—The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> * * * * * * *
>
> (3) Statement against interest.—A statement which . . . at the time of its making . . . so far tended to subject him to civil . . . so far tended to subject him to civil . . . liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true.

In relying on this hearsay exception rule, Lazzara argues that McElroy subjected himself to civil liability by admitting possible fault in the laundromat fire.

[49] We find no error in the judge's decision to strike the hearsay testimony. As reflected by the specific language used in Rule 804(b)(3), the statement against interest must be almost a direct, outright statement that the person was legally at fault. McElroy's statement simply indicated that he might have been the one who caused the fire. There was testimony from fire inspectors that a hot plate was involved but that the fire was the result of arson. We agree with the trial judge that McElroy's statement was not a declaration sufficiently subjecting him to civil liability to invoke the quoted exception to the hearsay rule.

11. Sequestration Breaks

[50] Appellants complain that once the trial judge chose to sequester the jury, it was error for him then to allow breaks in that sequestration by permitting the jurors to visit with family members without repeatedly reinstructing them about avoiding outside influence. Before a rever-

sal will lie on this ground, appellants "must demonstrate a substantial likelihood that some prejudice did result." *United States v. Harris,* 458 F.2d 670, 675 (5th Cir.), *cert. denied,* 409 U.S. 888, 93 S.Ct. 195, 34 L.Ed.2d 145 (1972).

[51, 52] The trial judge has the discretion to decide whether to disperse the jury. *Tyler v. United States,* 397 F.2d 565 (5th Cir. 1968), *cert. denied,* 394 U.S. 917, 89 S.Ct. 1187, 22 L.Ed.2d 450 (1969). In the cases dealing with breaks in sequestration, emphasis is usually placed upon the fact that the judge reminded the jury to avoid outside influence. *United States v. Banks,* 485 F.2d 545 (5th Cir. 1973), *cert. denied,* 416 U.S. 987, 94 S.Ct. 2391, 40 L.Ed.2d 764 (1974); *Tyler, supra.* In the instant case, while the jury was not reinstructed prior to every break in sequestration, they were constantly reminded during the course of the trial (at which time they were not under order of sequestration) not to discuss the case with anyone and to avoid reading any publicity concerning the trial. While sequestered, and pursuant to the judge's orders, the U.S. Marshals (in whom custody of jurors is entrusted) repeatedly reminded the jurors to refrain from discussing the case. Newspapers brought in by family members were edited before being given to the jurors. There can be no doubt that the jurors were fully aware of their responsibilities.

The jurors deliberated for 3 1/2 weeks; their sequestration spanned three weekends. We see no error in the judge allowing jurors to visit with their families at the hotel on Sundays. In light of the precautions taken by the judge during the trial, and through the marshals during deliberations, we see no basis for the contention that the defendants were prejudiced by the judge's failure to reinstruct the jurors personally of to voir dire each one concerning possible exposure after the visitation periods. The

allowance of family visits was a reasonable, humane and understanding act by the trial judge. No reversible error lurks within.

12. Miscellany

Finally, Russello urges three other assignments of error: a biased grand jury, exclusion of evidence about Noriega's character and an improper jury charge.

a. Grand Jury Bias

Russello contends he was deprived of his right to an unbiased grand jury because of two incidents. First, he complains that the prosecutor should not have called him to testify before the grand jury because after he received his subpoena, his attorney advised the prosecutor that Russello intended to exercise his Fifth Amendment privilege. Russello was nevertheless called as a witness; he exercised his Fifth Amendment privilege.

[53, 54] It has long been recognized that "[c]itizens generally are not constitutionally immune from grand jury subpoenas." *Branzburg v. Hayes,* 408 U.S. 665, 682, 92 S.Ct. 2646, 2657, 33 L.Ed.2d 626 (1972). Our courts have repeatedly reaffirmed "the historically grounded obligation of every person to appear and give his evidence before the Grand Jury." *United States v. Dionisio,* 410 U.S. 1, 9, 93 S.Ct. 764, 769, 35 L.Ed.2d 67 (1973). "The personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the pubiic." *Blair v. United States,* 250 U.S. 273, 281, 39 S.Ct. 468, 471, 63 L.Ed. 979 (1919). Russello's claim that he should not have been called after revealing his intention to remain silent is without merit.

[55] Russello also alleges that after his appearance before the grand jury, he learned that the prosecutor, in the presence of the grand jury, told Farina that he, Farina, was a disgrace for exercising his right to remain silent. Russello argues that this was also a reflection on his right to remain silent. He points to no specifics to show that the jury imputed to him the prosecutor's comment and attitude toward Farina. We do not agree that the prosecutor's comment about Farina was an attack on Russello's character. Russello was not denied the right to an unbiased grand jury.

b. Exclusion of Evidence

The thrust of Russello's second contention is that he and his family were threatened by Noriega, that his building had been burned without his knowledge and that he had paid Noriega only because Noriega extorted the money. To support the argument that Noriega was a violent man, and to rebut inferences from government testimony to the contrary, Russello called a witness who was to testify about shooting Noriega after Noriega threatened the witness's employer. The trial judge ruled the evidence inadmissible under Fed.R.Evid. 608(b).

Russello relies on *United States v. Opager,* 589 F.2d 799 (5th Cir. 1979), where the trial judge excluded certain business records which would have shown that one of the government's key witnesses was lying about a fact material to Opager's defense. In response to Opager's defense of entrapment, the government witness testified, in an effort to show the defendant's predisposition to commit the crime, that he had worked with the defendant and had seen her engage in the same criminal conduct. The business records Opager sought to introduce would have

established that she and the witness had not worked together at the pertinent time. In reversing the conviction, we emphasized that the evidence did not merely go to the witness's character for truthfulness, but rather was relevant specifically to contradict the witness's testimony as to a *material issue*. *Opager* is distinguishable from the situation in the case at bar.

[56] Although Russello relied on the defense that he acted in response to threats from Noriega, Noriega's threats against the employer of the witness called by Russello did not relate directly to Russello as the excluded testimony in *Opager* related directly to the defendant. The material issue here was not whether Noriega had threatened the witness's employer, but whether Noriega had threatened Russello. The evidence was not relevant to a "material issue" within the context of *Opager*. We find no error in the exclusion of this testimony.

c. Jury Instruction

[57] Russello contends that the trial judge did not correctly charge the jury as to the evidence required for a mail fraud conviction. The challenged portion of the jury charge states: "A statement or representation may also be 'false' or 'fraudulent' when it constitutes a half-truth, or effectively conceals a material fact, with intent to defraud." Russello relies on *United States v. Meadows*, 598 F.2d 984 (5th Cir. 1979), in which we held that a similar instruction created reversible error. There is one dispositive difference between the charge in *Meadows* and the charge *sub judice*. The trial judge in *Meadows* stated that "under the law fraud may result from statements of half-truths or the concealment of material facts." *Id.* at 987. The statement that created reversible error resulted

from the failure by the court to remind the jury of the intent required to convict. In the instant case the trial judge added four critical words to the instruction that had been found wanting in *Meadows;* the instruction complained of here concludes with the words "with intent to defraud." That phrase takes this instruction out of the *Meadows* category and compels our rejection of this claim.

G. Sufficiency of the Evidence

[58] Most of the appellants challenge the sufficiency of the evidence to support their convictions on both the RICO and the mail fraud charges. We recently reiterated the standard for review of such a challenge in *United States v. Marx,* 635 F.2d 436, 438 (5th Cir. 1981):

> In reviewing the sufficiency of the evidence, we must view all the evidence, direct and circumstantial, in the light most favorable to the government, and must accept all reasonable inferences and credibility choices that tend to support the jury's verdict. (Citations omitted.) The standard of review is whether a jury could reasonably find that the evidence was inconsistent with every reasonable hypothesis of innocence or, put another way, whether a reasonably minded jury must necessarily entertain a reasonable doubt of the defendant's guilt.

With respect to the conspiracy convictions, the test on appeal is whether there is substantial evidence to support the verdicts. *Id.; United States v. Malatesta,* 590 F.2d 1379 (5th Cir.) (en banc), *cert. denied,* 440 U.S. 962, 99 S.Ct. 1508, 59 L.Ed.2d 777 (1979). We shall review the RICO convictions separate from the mail fraud convictions

because of the obvious difference in the evidence required to sustain convictions.

1. RICO Convictions

[59] Five necessary elements comprise a substantive RICO charge. The government must prove (1) the existence of the enterprise; (2) that the enterprise affected interstate commerce; (3) that the defendant was employed by or associated with the enterprise; (4) that he participated in the conduct of the affairs of the enterprise; and (5) that he participated through a pattern of racketeering activity.

In reviewing the RICO convictions we bear in mind the broad reach of the RICO statute, as articulated in *Elliott*, 571 F.2d at 903:

> The substantive proscriptions of the RICO statute apply to insiders *and outsiders* – those merely "associated with" an enterprise – who participate directly *and indirectly* in the enterprise's affairs through a pattern of racketeering activity. (Citations omitted.) Thus, the RICO net is woven tightly to trap even the smallest fish, those peripherally involved with the enterprise. (Emphasis in original.)

Even with a tightly woven net however,a fish, or whatever size, cannot be trapped unless he is "employed by or Associated with" the enterprise. In other words, the fish must first be swimming in the stream where the net has been placed before we reach the question of size. The indications from *Elliott* that only minimal association is necessary have caused fire lines to be drawn in determining those who are guilty of violating RICO and those who are

not. A defendant must know *something* about his co-defendants' related activities which make up the enterprise, but it is not necessary that he be aware of *all racketeering activities of each of his partners in the enterprise. Diecidue.*

[60, 61] To convict on a charge of conspiracy, the government must prove that the defendant had knowledge of the conspiracy and that he intended to join in the objectives of the conspiracy. The degree of criminal intent necessary for participation in a conspiracy must be *at least* equal to that require for the substantive offense itself. *Malatesta.* More specifically, to convict for conspiracy to violate RICO the government must prove that the person objectively manifested, through words or actions, an agreement to participate in the conduct of the affairs of the enterprise through the commission of two or more predicate crimes. *Bright* and *Elliott.*

2. Mail Fraud Convictions

[62, 63] The elements of the offense of mail fraud have been discussed in numerous decisions in this circuit, including the concise distillation in *United States v. Green,* 494 F.2d 820, 823-24 (5th Cir.), *cert. denied,* 419 U.S. 1004, 195 S.Ct. 325, 42 L.Ed.2d 280 (1975):

> The two basic elements of a mail fraud scheme are (1) the scheme to defraud, and (2) causing a mailing for the purpose of executing the scheme. While the mailing must, as the statute requires, be "for the purpose of executing the scheme . . . [i]t is not necessary that the scheme contemplate the use of the mails as an essential element. Indeed, it is sufficient if the mailing that is caused is "a part of the execution of the fraud," or is "in-

> cident to an essential part of the scheme." One "causes" the mails to be used when one "does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, such use can reasonably be foreseen, even though not actually intended." (Citations omitted.)

Thus, it is clear that if there is sufficient evidence to connect a defendant to the fraudulent scheme involving use of the mails, it is not necessary that he do any of the mailing. Co-schemers are jointly responsible for each other's acts when the acts are within the general scope and in furtherance of the scheme. *United States v. Rodgers,* 624 F.2d 1303 (5th Cir. 1980).

With these elements and standards in mind, we examine the claims of the various defendants that the evidence was insufficient to justify their convictions.

THE ARSONISTS

Frank Scionti:

[64] Scionti was found guilty on both RICO counts (Counts 1 and 2) and on four counts or mail fraud (Counts 3, 4, 5 and 6). Counts 3 and 4 dealt with the fire at 1811 Taliaferro Street. Counts 5 and 6 pertained to the laundromat fire in Miami. Scionti does not specifically assert that the evidence was insufficient to support his convictions on the mail fraud counts. The jury's verdict is therefore not challenged on those four counts. Furthermore, he concedes that the evidence was sufficient to support his convictions if the testimony of Noriega is to be accepted. His argument that Noriega was incompetent as a witness and because of his mental condition could not be

considered credible as a matter of law, has been discussed and decided adversely to him. *See United States v. Parker,* 586 F.2d 422 (5th Cir. 1978), *cert. denied,* 441 U.S. 962, 99 S.Ct. 2408, 60 L.Ed.2d 1067 (1979); *Jackson, supra.* We affirm Scionti's convictions.

Paul Guarino:

[65, 66] Guarino was convicted on both RICO counts and on fifteen counts of mail fraud. He does not specifically challenge the sufficiency of the evidence on any count. In his brief, he posits the "Statement of Issues," which does not question the sufficiency of the evidence, and then adopts the arguments advanced by the co-defendants in support of those issues and any other issues they raised that may apply to him. Although this is not an appropriate challenge to the adequacy of the evidence, we have made a general review of the evidence against Guarino and find it sufficient to convict him on the RICO counts and thirteen of the mail fraud counts. As to Counts 17 and 18, for the reasons discussed *infra,* with respect to defendant Lostracco, we reverse Guarino's convictions. The evidence does not establish that the charged mail frauds occurred.

THE FINANCIERS

Berton B. Chase:

Chase is the only defendant charged solely with conspiracy. He argues that the evidence was sufficient to support his conviction because it showed an agreement to commit only one predicate act rather than the requisite "pattern of racketeering activity." We agree.

Chase was indicted because of his involvement in the arson of a warehouse located on 12th Street in Tampa. Mar-

tino had a ninety day option on the building. Noriega and Guarino acquired the option from Martino and upon exercising it, put title in the name of Alex Fekete, an unindicted co-conspirator who testified as a government witness. As part of the purchase arrangements, Fekete gave the seller a first mortgage covering the credit portion. Insurance coverage was to be transferred to Fekete and additional coverage was obtained. When more money was needed for building repairs, Chase was approached. He arranged for a loan of $12,000 by a client, secured by a second mortgage on the property, and received $6,000 as a "kickback." The mortgage was to be paid with insurance proceeds expected from the planned arson.

Fekete was to maintain the insurance coverages, however, he became delinquent in paying the premiums. The seller paid the premiums on the original policy and threatened to foreclose on his mortgage unless he was reimbursed for the money advanced. In order to prevent the foreclosure, and to protect his client's interest as holder of the second mortgage, Chase reimbursed the seller.

An attempt was later made to transfer title from Fekete to the second mortgage holder. Before the transfer was completed, and pursuant to Chase's instructions, Noriega burned the warehouse. Because Fekete had failed to pay the premiums on the additional insurance he had secured, only the insurance the seller had purchased was collected.

The evidence appears sufficient to convict Chase of arson or of conspiring to commit that offense, but those are not the charges for which he stood trial. He was charged and convicted of conspiring to participate in the conduct of the affairs of an enterprise through a pattern of racketeering activity. As pointed out in *Elliott*, 571 F.2d at

902, "the object of a RICO conspiracy is to violate a substantive RICO provision . . . and not merely to commit each of the predicate crimes necessary to demonstrate a pattern of racketeering activity." One who does not agree to do that vital element – participate in the enterprise through the commission of at least two predicate acts – cannot be convicted on a RICO conspiracy charge. In effect there are two agreements contained in a RICO conspiracy charge: an agreement to participate and an agreement to commit at least two proscribed acts.

A review of the evidence reflects that Chase agreed to arrange a loan secured by mortgage on a building, with the knowledge the building would be burned and the mortgage would be paid with a portion of the insurance proceeds. He received a "kickback" for his efforts. According to Noriega, Chase set the time for the fire. Chase also acted to protect Fekete's ownership of the building by reimbursing the seller's insurance premiums in order to avoid foreclosure on the first mortgage.

[67] The only agreement which may be classified as an agreement to commit a predicate crime as defined in § 1961 is Chase's agreement to commit arson. Chase was not charged with mail fraud. There was no mail fraud committed in connection with that arson because the only insurance claim submitted was that of the former owner/mortgagee on a legitimate policy. The only predicate act enumerated in the indictment implicating Chase involves the arson of the warehouse.

Absent a charge and proof of an agreement to comit two of the specified predicate crimes, a defendant cannot be convicted of conspiring to participate in the affairs of an enterprise through a pattern of racketeering activity. Chase's conviction for conspiring to violate RICO is invalidly based and must be reversed.

Sam Martino:

Martino does not challenge the sufficiency of the evidence on his convictions of the mail fraud counts (Counts 14, 15 and 16). With respect to the RICO convictions. Martino argues that as a mere customer of the services offered by the enterprise, his conduct did not fall within the proscription of RICO. The evidence establishes that Martino was more than a customer of the enterprise, he was a recurring figure in the activities of the enterprise.[15] As a real estate agent and mortgage broker, Martino played a multifaceted role. The evidence shows that he assisted in the acquisition of three properties in Tampa that were considered suitable for burning.

The property located at 2020 E. Columbus was purchased by Noriega through the assistance of Martino. The prior owner had been making mortgage payments to Martino's Ybor Loan Company but sold the house because of tax problems and because it became apparent that costly repairs would have to be made to avoid condemnation by housing inspectors. The first mortgage on the house was assumed by Noriega and an existing $4,000 insurance policy was transferred to him. Noriega doubled the existing coverage before acquiring two additional policies, each affording $15,000 protection. Carter was instrumen-

[15]Martino points to his acquittal on several counts as support for his argument that his limited contacts with the enterprise, evidenced by his conviction on charges relating to only one fire, did not amount to participating in the conduct of the affairs of the enterprise. While the jury may not have found that the government proved Martino's guilt in the mail fraud scheme, that does not necessarily mean that the jury did not believe that Martino was somehow involved. The evidence of his involvement, while not sufficient to convict for mail fraud, would support the conclusion that he was associated with the enterprise and a participant in the conduct of its affairs.

tal in obtaining the additional insurance. Four months after the house was acquired, it was burned by Noriega and Guarino and insurance proceeds were collected on the policies[16] Martino had ordered the cancellation of the $8,000 policy transferred from the prior owner although the order did not go into effect until after the fire. The mortgages held by Martino's loan company were paid with insurance proceeds.

With the help of Martino, Noriega was able to purchase additional substandard property located at 3006 N. Nebraska.[17] Martino initially arranged a loan to Noriega for $7,000, taking a "kickback" of $1,500. Later, when money was needed for repair work, Martino arranged a $1,500 loan secured by a second mortgage. Noriega then sold the property to Macaluso, paying the mortgage with the proceeds of the sale.

Martino also had a connection with the warehouse discussed earlier. He initially leased the property for one year and had a ninety day option. His original plans were to over-insure the building and then burn it. These plans changed and he sold his interest in the property to Noriega and Guarino and assigned the option.

[68] The evidence reflects more than Martino's mere association with the enterprise; it shows that he played an important role by assisting in the acquisition of properties suitable for burning. His participation in the conduct of the affairs of the enterprise is further evidenced by his con-

---

[16]Martino was convicted on three mail fraud counts relating to the fire at this location.

[17]Martino was acquitted on the mail fraud counts relating to this property.

viction on the three counts of mail fraud. We affirm his conviction on Count 2. The evidence is sufficient to sustain the conviction on Count 1. The requisite element of agreement is apparent from his actions.

THE MISGUIDED ENTREPRENEURS

Amalia Morgado:

[69, 70] Morgado does more than claim that the evidence is insufficient to support her convictions on Counts 21 and 22; she argues that there is *no* evidence that she placed or caused to be placed, in the United States mail, the Proof of Loss which is the subject of those counts. After reviewing the record, we agree that there was no evidence offered showing that Mrs. Morgado personally mailed the Proof of Loss. Such evidence is not required, however, to support the convictions on the mail fraud counts. "It is well settled in this circuit that so long as one participant in a fraudulent scheme causes a use of the mails in execution of the fraud, all other knowing participants in the scheme are legally liable, for that use of the mails." *United States v. Toney,* 598 F.2d 1349, 1355 (5th Cir. 1979), *cert. denied,* 444 U.S. 1033, 100 S.Ct. 706, 62 L.Ed. 670 (1980). The evidence shows that Morgado was involved with several other defendants in the scheme to defraud the insurer through the arson of the Vasconia Street property. The mail fraud convictions are supported by the requisite evidence.

[71] The evidence, viewed through the mandated appellate prism, shows that Morgado served on the "marketing" staff of the enterprise as a connection between persons wanting to burn their property and the arsonists. She was instrumental in arranging for Noriega to burn the Vasconia Street property owned by co-defendant

John Alan Holt. She made the initial contacts and paid Noriega for his services with checks written on her personal account. Her participation in at least the initial stages of the fraudulent scheme is apparent. Once she became involved in the scheme, she had to do some affirmative act of withdrawal before she may disclaim responsibility for the subsequent acts of her co-schemers. *United States v. Bradsby,* 628 F.2d 901 (5th Cir. 1980). There is no evidence of any affirmative action on the part of Morgado to withdraw from the scheme.

[72] Having concluded that the evidence was sufficient to convict Morgado on the two counts of mail fraud, we examine her convictions on the RICO substantive and conspiracy counts. Morgado was involved in arson and mail fraud, both of which are statutorily designated predicate crimes and base the charge that she engaged in a "pattern of racketeering activity." The final inquiry is whether Morgado's association with the enterprise has been established. The evidence implicated Morgado in another Tampa arson that was not included in the mail fraud counts. Again acting as the "marketing" person for the enterprise, Morgado arranged for her sister to buy substandard property which later was burned. Her sister recovered under a fire insurance policy after Morgado acted as notary on the Proof of Loss. Morgado was associated with the enterprise; she worked at furthering the business in which the enterprise was engaged. Convinced that the evidence sufficiently establishes all of the elements required for a RICO substantive offense, we affirm Morgado's conviction on Count 2. The evidence also establishes the required element of agreement, accordingly, Morgado's conviction on Count 1 is also affirmed.

Joseph Macaluso:

Macaluso was convicted on both RICO counts and on five counts of mail fraud. His challenges to the mail fraud convictions stem from a variance between the indictment and the proof adduced at trial and point to an alleged inconsistency in the verdicts with respect to other defendants also charged in the counts.

[73, 74] Counts 11, 12 and 13 arose out of the arson and subsequent collection of insurance proceeds for property located on N. Nebraska. The indictment charged Macaluso, Morgado, Martino, Carter, Guarino and Noriega. The jury acquitted Martino, Morgado and Guarino on these counts. Noriega and Carter pled guilty. Macaluso argues that the verdicts necessarily indicate that the jury rejected Noriega and Carter as credible witnesses and, therefore, his conviction must be reversed because it is inconsistent with the verdicts on the others. We do not agree. A similar argument was rejected in *United States v. Dubea,* 612 F.2d 950 (5th Cir. 1980), and in *United States v. Michel,* 588 F.2d 986 (5th Cir.), *cert. denied,* 444 U.S. 825, 100 S.Ct. 47, 62 L.Ed.2d 32 (1979). Our inquiry on appeal is limited to determining whether the evidence in sufficient to support the counts on which the appellant was convicted; we do not look at what the jury did with other counts or other defendants. Because the jury may have chosen not to believe Carter and Noriega with respect to the other defendants does not mean that they had to find those witnesses not credible as to their testimony concerning Macaluso. Reviewing the evidence against Macaluso, we find that there was sufficient evidence to support his convictions on Counts 11, 12 and 13. Those convictions are affirmed.

Counts 7 and 8 charge mail fraud with respect to the ar-

son and subsequent collection of insurance proceeds for property located at the corner of 10th Street and 12th Avenue. Macaluso challenges his conviction specifically on Count 8 because, while the indictment charged that the object of the Count 8 mail fraud was mailed from New York to Jacksonville, the evidence showed that the mailing occurred between Jacksonville and Tampa. This inconsistency, it is argued, prejudiced Macaluso's substantial rights to the extent that a reversal is warranted.

[75, 76] We find a variance between the indictment and the evidence as to the specific mailing locations involved in Count 8. We do not agree, however, that this variance affected Macaluso's substantial rights. The addresses of the sender and addressee were not the only information set forth in Count 8. The indictment also set out the numbers of the drafts that were sent through the mail, the names of the payees, and the amounts involved. All of this information was correct. The variance in *United States v. Cook,* 586 F.2d 572 (5th Cir. 1978), *cert. denied,* 442 U.S. 909, 99 S.Ct. 2821, 61 L.Ed.2d 274 (1979), where the indictment charged a mailing to the United States Air Force and the evidence showed the mailing went to the General Services Administration, was considered a "technical variance . . . best relegated to the 'immaterial' category." *Id.* at 575. Considering the totality of the circumstances at bar, this expression from *Cook* applies. The variance Macaluso notes is not reversible error. Macaluso does not point to any specifics with regard to the claim of insufficient evidence as to Count 7. Our general review discloses the evidence is sufficient. The convictions on Counts 7 and 8 are affirmed.

[77] With regard to his RICO convictions, Macaluso argues that if he was involved in a conspiracy, it was for the limited purpose of aiding in the arson. Our review of

the evidence results in a contrary conclusion. The arsons in which Macaluso was involved were part of the main business of the enterprise. He acted as the go-between or contact person for the arson of the 10th Street and 12th Avenue property, and he participated in its burning. He was also the owner of the N. Nebraska property that was burned. Several members of the enterprise were involved in those incidents. We are persuaded that the evidence establishes Macaluso's active involvement in the affairs of the enterprise.

Macaluso's final contention is that the evidence did not show he intended to further the affairs of the enterprise.

This argument is without merit. By his active involvement Macaluso did further the enterprise's affairs. We affirm Macaluso's convictions on Counts 1 and 2.

John Lostracco:

Lostracco was convicted on RICO Counts 1 and 2 and mail fraud Counts 17 and 18. He challenges the sufficiency of the evidence. We agree.

[78] An arson committed at a 27th Street address provides the basis for the mail fraud charges. The property was owned by Lostracco's brother-in-law and sister-in-law, Mr. and Mrs. Joseph Bartolotti. Lostracco acted as the real estate agent for the proposed sale from the Bartolottis to Noriega and Guarino. Title to the property was to be put in the name of Jimmy Traina, who was to share the fire insurance proceeds with Noriega and Guarino. The Bartolottis were aware only of Traina's interest. Although a contract to sell was executed, the plans went awry when Noriega burned the house before title actually passed to Traina. At the time of the arson the Bartolottis still owned the property and were the insureds under an in-

surance policy. There is no evidence that the Bartolottis were involved in the arson or had any knowledge of the plan to burn the building for the insurance.

After learning that the property had been burned and that they were still the owners, the Bartolottis submitted their insurance claim. This claim was not fraudulent; their policy was valid and they were not aware of the arson. Counts 17 and 18 charge Lostracco with mail fraud in connection with the sworn statement in the Bartolotti Proof of Loss and the insurer's draft issued to the Bartolottis. There is no evidence that the Bartolottis submitted a claim under their policy intending to deliver over or share the insurance payment with any member of the enterprise. To the contrary, the evidence reflects that Noriega, Guarino and Traina received the insurance proceeds only after threatening and pressuring the Bartolottis.

[79] There is no evidence of Lostracco's involvement in a mail fraud scheme centered on the Bartolottis' 27th Street property because no mail fraud occurred. If the sale had been consummated as planned, and if Traina had collected on the fire policy, a mail fraud would have been perpetrated. Under those circumstances, if Traina had not been able to collect for some reason, the government still could have proven mail fraud because success of the scheme is not required for a conviction. The government takes the position that the facts present an unsuccessful mail fraud scheme and, therefore, Lostracco's convictions must stand. The evidence does not support that conclusion. The Bartolotti claim and the payment to them cannot be transformed into mail fraud and imputed to the enterprise. The previously discussed rule that co-schemers are jointly responsible does not apply because there is no evidence that the Bartolottis were co-schemers. Lostracco's convictions on Counts 17 and 18 must be reversed.

[80] In order to be convicted on a RICO substantive charge under § 1962(c), there must be evidence that the defendant participated in the conduct of the enterprise's affairs through a pattern of racketeering activity which requires the commission of two predicate crimes. The evidence supports findings that Lostracco participated in the arson and in discussions which could lead to mail fraud. Section 1961, however, specified only completed offenses as predicate acts; neither attempts nor conspiracies (perhaps other than conspiracies involving drugs) are included. The evidence establishes that Lostracco committed only one predicate act. Accordingly, his conviction on Count 2 must be reversed.

Having found that Lostracco is not guilty of the RICO substantive offense because he did not commit two predicate acts, we must now inquire whether the indictment charge and the evidence proved that the *agreed* to commit two recognized predicate acts. The two acts of racketeering charged are the arson at the 27th Street address and the alleged mail fraud resulting from the insurance claim by the Bartolottis.

[81] There was no mail fraud committed when the Bartolottis made their fire loss claim. Consequently, Lostracco's involvement in that claim could not constitute an agreement to commit a criminal act. We are cognizant that the evidence reflects a plan by Lostracco and others to commit arson and mail fraud. The mail fraud which was a part of that plan, however, is not the mail fraud charged in the indictment.

A RICO conspiracy conviction requires that the indictment charge and the proof establish the two predicate crimes agreed to. The evidence does not support the charged mail fraud and Lostracco's conviction on Count 1 must be reversed.

THE DISSATISFIED OWNERS

John Alan Holt:

Holt's challenge to the sufficiency of the evidence supporting his mail fraud convictions is based on the government's alleged failure to prove that venue was proper as to Count 21 and the asserted lack of evidence that Holt mailed or caused to be mailed the items named in Counts 21 and 22.

[82, 83] Venue for a mail fraud conviction is proper in any of the districts from, through, or into which the item of mail moved. 18 U.S.C. § 3237(a). The government had to show that the Proof of Loss for Holt's insurance claim was either mailed from the Middle District of Florida, mailed to the Middle District of Florida, or that it passed through the Middle District of Florida, as it traveled to its destination. The burden of proof to establish venue is not as onerous as the burden required for proof of an element of a crime. Venue need only be proven by a preponderance of the evidence. As long as there is circumstantial evidence in the record supporting the inference that the crime was committed in the district where the trial is held, direct evidence is not required. *United States v. White,* 611 F.2d 531 (5th Cir. 1980); *United States v. Turner,* 586 F.2d 395 (5th Cir. 1978), *cert. denied,* 440 U.S. 926, 99 S.Ct. 1258, 59 L.Ed.2d 480 (1979).

[84] The subject of the mail fraud charged in Count 21 is a sworn Proof of Loss signed by Holt which was mailed by the office of the Safeco Insurance Company in Tampa to the Safeco Insurance Company in Atlanta. Holt argues that there is no evidence showing where Safeco in Tampa had mailed the item or where Safeco in Atlanta had received it. This argument is not supported by the record. Dale

Jermyn, the former claims manager for the Tampa Safeco office, testified that after the original Proof of Loss was received in his office, it was customary to sent it by mail to the Atlanta division office. He further testified that, with respect to the specific Proof of Loss at issue here, the original had been mailed to the Atlanta office by Mr. Parker, the Tampa office adjuster. Holt underscores that Jermyn did not specifically testify that the item was mailed from the Tampa post office. We cannot accept Holt's argument that the jury could just as easily have inferred that Mr. Parker chose to go outside of Tampa and the judicial district, to mail the document. Nor can we accept the suggestion that the document mailed to the Atlanta office was received somewhere other than Atlanta. Under the facts reflected in this record, the most obvious and compelling inference is that the item was mailed in Tampa and received in Atlanta. Venue properly lies in the Middle District of Florida.

[85, 86] Holt's second argument is based on the absence of testimony pointing to his mailing or causing to be mailed the Proofs of Loss. This argument founders on the rubrics expressed in our prior decisions which speak to the evidence required to sustain mail fraud convictions. It was not necessary to prove that Holt actually did the mailing, "he need only have had a reasonable basis to forsee that his actions would result in the use of the mails." *United States v. Georgalis,* 631 F.2d 1199, 1206 (5th Cir. 1980); *Toney, supra; Banister v. United States,* 379 F.2d 750 (5th Cir. 1967). Though one lacks the actual intent to use the mails, one "causes" the mails to be used when the acts with the knowledge that the mails will be used in the ordinary course of business. *Pereira v. United States,* 347 U.S. 1, 74 S.Ct. 358, 98 L.Ed. 435 (1954).

[87] The facts surrounding the mail fraud counts

against Holt are very similar to those which were before the court in *Banister, supra.* Holt argues that Count 21 charges the sending by one insurance agent of a Proof of Loss to another insurance agent, a mailing with which he had absolutely nothing to do. As to Count 22, he argues that there is no evidence that the attorney who claimed to be representing Holt in sending the Proof of Loss to the insurance agent was acting at Holt's direction. This argument was unsuccessfully urged in *Banister,* where we found that the jury could have reasonably inferred that when the defendants dealt with a local agent of an insurance company, they reasonably should have contemplated that the mails would be used when the local agent dealt with the home company. Likewise, the jury in this case reasonably could have inferred that in filing a claim with his local insurer, Holt should have known that the mails would be used in the processing of his claim. We find sufficient evidence to support Holt's convictions on the mail fraud counts.

[88] Holt's objections to his RICO convictions focus on his level of involvement and the number of people with whom he has involved. He does not deny that an enterprise engaged in the busines of burning property with the intent to defraud insurance companies existed; he argues, rather, that the evidence showed his involvement was limited to an association with Noriega, not an association with the overall enterprise. The evidence does not support this argument. Holt's involvement extended beyond an association with Noriega and included contacts with at least Morgado. There was sufficient evidence for the jury to infer that Holt was associated with the enterprise. Once established that he was connected with the enterprise, his participation in the conduct of its affairs was proved by evidence of the arson and the mail frauds. Holt's convic-

tion on Count 2, therefore, is affirmed. Affirmance of the Count 1 conviction for agreeing to participate necessarily follows for the reasons and on the authorities previously discussed.

Rolando Gonzales Rodriguez:

Rodriguez stands convicted on four counts: the two RICO counts and Counts 7 and 8 of the mail fraud charged. He adopts by reference the arguments made by his co-defendants with respect to Counts 1, 2 and 7; with respect to Count 8, he relies on the variance argument presented by Macaluso. We have rejected the variance argument and Rodriguez's conviction on Count 8 is affirmed.

[89] Rodriguez's convictions arose out of the arson of property he owned on the corner of 10th Street and 12th Avenue. Macaluso put Rodriguez in touch with Noriega. After agreeing to undertake the "torching," Noriega enlisted the help of Guarino and Macaluso. The fire was only partially successful, but with Carter's help in adjusting the claim, $500 was received from the insurer. Rodriguez does to point to any specifics with respect to his claim of insufficient evidence to support his convictions on Counts 1, 2 and 7. After making a general review of the evidence, we are persuaded that there is sufficient evidence to support the jury's conclusion that Rodriguez was guilty of the mail fraud charged in Count 17, as well as his guilt of the RICO charges in Count 1 and 2. His convictions are affirmed.

Joseph Lazzara:

Lazzara was convicted on Counts 1, 2, 5 and 6. The charges arose out of the burning of a Miami laundromat

owned by Lazzara. We find the evidence sufficient to support the four convictions and affirm.

[90] With respect to the mail fraud convictions, Lazzara argues that because no one in the enterprise did the mailing or assisted him in processing his claim, the mailings were not affairs of the enterprise and therefore he should not have been convicted. The acts of mail fraud for which he was convicted directly followed the arson that was committed by the enterprise; the fraudulent collection on the insurance policy was part of the scheme. It was not necessary that members of the enterprise be involved in the actual filing of the claim. Mail fraud is listed as one of the designated predicate crimes; the mail frauds charged herein were clearly related to the affairs of the enterprise. *See Bright, supra.* Lazzara's argument to the contrary is infirm.

[91] Lazzara's challenge to the sufficiency of the evidence to support his convictions for RICO violations is based on an erroneous interpretation of what is required for a RICO conviction. He argues that the phrase "to conduct or participate in the conduct" of the affairs of an enterprise means that the person must be involved in the control or management of the enterprise. This contention has been proffered and rejected. *See Tucker, supra.* Section 1962(c) reaches persons employed by or associated with the enterprise who are not involved in management. It was not necessary to show that Lazzara was in a management position for a conviction under RICO. The evidence was sufficient to show his association with the enterprise and participation in its affairs through the arson and mail fraud activities. We affirm Lazzara's conviction on Count 2.

Our affirmance of Lazzara's conviction on Count 2

leads inexorably to affirmance of his conviction on Count 1 for the reason previously articulated.

Rosario Palermo:

[92] The jury convicted Palermo on Counts 1, 2, 3 and 4. His appeal on the claim of insufficient evidence, aimed only at the RICO convictions, is multi-faceted. He claims: (1) that the single act of arson in which he was involved did not constitute a pattern of racketeering activity; (2) that a customer of the arson services offered by the enterprise does not fall within the category of associates of the enterprise participating in the conduct of its affairs; and (3) that if his conduct amounted to conspiratorial behavior, it was a limited conspiracy separate and apart from the one alleged in the indictment. Palermo does not specifically challenge the mail fraud convictions. Having examined the evidence generally, we affirm his convictions on Counts 3 and 4.

Property located on Taliaferro Street grounded Palermo's involvement and convictions. Although Guarino was part owner of the property, it was recorded only in Palermo's name. They purchased the building in March 1973 and the existing insurance coverage was transferred to Palermo. The property was partially burned shortly thereafter and insurance was recovered for the damage. In August 1973 Palermo obtained additional insurance on the house after making certain repairs necessitated by the previous fire. In late September Noriega, assisted by Guarino and Scionti, burned the house. The insurance company paid the full face value of the policy.

[93] Palermo's first argument is without merit. The alleged "single act of arson committed to defraud an in-

surance company" actually consisted of the arson and two acts of mail fraud in the collection on the insurance policy. Contrary to Palermo's suggestion, the two acts of mail fraud were more than "intertwined events" or "incidental statutory violations" arising out of the arson. The arson and mail frauds were evidence of the predicate crimes related to the affairs of the enterprise, thus meeting the requirements for proving a pattern of racketeering activity. *See Bright, supra; United States v. Morris,* 532 F.2d 436 (5th Cir. 1976).

[94] Palermo's second argument is likewise rejected. Palermo was not a mere "customer" of an enterprise offering arson services; he was a part of the enterprise itself, as charged in the indictment. The "enterprise" of which Palermo claims to have been only a customer was not a duly formed corporation with elected officers and annual meetings. It was "an amoeba-like infra-structure," *Elliott,* 571 F.2d at 898, involved in a network of secret criminal activity. Congress decreed that by committing two of the designated predicate crimes related to the affairs of the "enterprise," a person participates in the enterprise and thus violates RICO. As distinguished from the Travel Act, 18 U.S.C. § 1952, and the provision relative to illegal gambling businesses, 18 U.S.C. § 1955, both of which do not reach customers, 18 U.S.C. § 1962 does contemplate the prosecution of those "customers" who engage in a pattern of racketeering activity in furtherance of the affairs of the enterprise. By definition such a person becomes more than a customer of the enterprise.

[95] We also reject Palermo's third argument that his was a limited conspiracy and not the one charged in the indictment. Each arson and subsequent mail fraud committed by the various defendants was a piece of the overall scheme. Palermo's alleged separate conspiracy was not a

separate conspiracy at all; it was an integral part of the arson enterprise at work in Tampa. *See Diecidue, supra.* We affirm Palermo's convictions.

John Fisher:

Fisher stands convicted on Counts 1, 2, 32 and 33, based on his involvement in the N. Armenia Street fire. His challenge to the sufficiency of the evidence is based solely on Noriega's alleged incompetence and lack of credibility as a matter of law. That issue has been discussed and resolved adversely to Fisher. His convictions are affirmed.

Jimmy Farina:

Farina, a former Captain with the Tampa Fire Department, stands convicted of the two RICO counts and of mail fraud Counts 9 and 10. The convictions are based on the arson involving Farina's property on 20th Avenue in Tampa.

The evidence reflects that Farina met with Noriega and Martino to discuss the acquisition of certain property located off Bayshore Boulevard in Tampa. Their plans were to insure and then burn the property to collect the insurance. The property was to be put in Noriega's name because no property titled in his name had been burned as of that time. These plans were aborted.[18] During discussions concerning other property, Farina made known that he wanted his 20th Avenue building burned. The building was insured for $4,000 and Farina agreed to pay Noriega 10% to burn it. Noriega and Guarino subsequently set fire

[18]Martino was charged in Counts 9 and 10 with Farina but was acquitted on those mail fraud charges.

to the premises. Farino submitted a claim on his policy and recovered the full $4,000. Noriega was paid $400.

[96-98] Farina contends that the evidence offered was insufficient to prove that he was associated with the enterprise, participated in the conduct of its affairs or conspired with its members. He argues that albeit he purchased Noriega's services, he could not have joined the enterprise because the evidence does not show he had knowledge that Noriega acted in concert with others. The jury may draw the natural inferences arising from evidence, including an inference of association, and was entitled to infer that Farina, while dealing directly only with Noriega and possibly Martino, was aware of the existence of the ongoing arson operation. Farina approached Noriega with the suggestion that they acquire, insure and burn property, as well as the suggestion that his property on 20th Avenue be torched. It is reasonable to infer from that evidence that Farina indeed knew about the person with whom he was dealing. "A party to a conspiracy need not know the identity, or even the number, of his confederates." *Elliott,* 571 F.2d at 903, *quoting United States v. Andolschek,* 142 F.2d 503, 507 (2d Cir. 1944). The government did not have to prove that Farina knew all of the details or the full extent of the enterprise, proving knowledge of the essential nature was sufficient. Furthermore, "[w]hen a person 'embarks upon a criminal venture of indefinite outline, he takes his chances as to its content and membership, so be it that they fall within the common purposes as he understands them.'" 571 F.2d at 904. The jury could reasonably infer that by his dealings with Noriega, Farina joined in the activities of the enterprise. That conclusion leads to the inquiry whether Farina can be convicted of a RICO violation when the evidence reflects particiation in only one arson. We have answered this in-

quiry in the affirmative. Once Farina joined the conspiracy, he could "withdraw," but only by taking some affirmative action to defeat or disavow the purpose of the conspiracy. *United States v. Killian,* 639 F.2d 206 (5th Cir. 1981); *Bradsby, supra.* The one claiming withdrawal has the burden of proof. The evidence does not establish withdrawal by Farina. Farina also argues that his participation in the arson and mail frauds constituted a singular criminal episode which does not constitute a "pattern of racketeering activity." This argument has also previously been discussed and rejected.

We find the evidence sufficient to support Farina's convictions on Counts 1, 2, 9 and 10.

William H. Brown:

The jury found Brown guilty of Counts 1, 2, 30 and 31. his challenge on appeal targets the convictions on Counts 1 and 2. He argues that the government did not prove the required two predicate acts and, therefore, he could not be found guilty of violating RICO. We disagree.

[99] Brown bifurcates his argument. First, he contends that his alleged involvement in the fire on Lopez Drive did not amount to a predicate act. The evidence shows that Brown provided Noriega with transportation to and from the site of that arson, waiting nearby while Noriega did his work. Brown denies any knowledge of Noriega's purpose in visiting that address that day. We need not decide whether Brown was guilty of aiding and abetting in that arson because the evidence of his involvement in the burning of his hardware store is sufficient to establish that he engaged in a pattern of racketeering activity.

Brown's convictions are based on the arson of his hardware store located on S. Westshore Boulevard in Tampa.

He does not deny that he had the store burned. Instead, he takes the position that the hardware store arson is a single predicate act which is insufficient to support a RICO conviction. This argument has been previously advanced and rejected. Brown's convictions on Counts 1, 2, 30 and 31 are affirmed.

Robert Young:

Young's involvement in the arson on N. Armenia Street served as the basis for his convictions on Counts 1, 2, 32 and 33. Young takes the position that the only evidence having any tendency sufficiently to establish his guilt is the testimony of Noriega. He then argues that Noriega was incompetent as a witness for two reasons: (1) based on the psychiatric testimony produced at trial, Noriega was not credible as a matter of law, and (2) because Noriega had already become a government informant by the time the arson occurred on N. Armenia Street, he was incapable of providing the other part of a conspiracy.

[100] Young's first argument has already been discussed and rejected. We likewise reject Young's second argument. From the record it is unclear exactly when Noriega began to talk to state and federal authorities. Tampa Fire Marshal Bertrand O. Fox testified that Noriega first began to cooperate with the FBI in 1975. Noriega testified that his first meeting with government authorities occurred in early 1976, but that the parties involved were not able to reach an agreement at that time and that he did not begin cooperating with them until several months later. While there obviously is a conflict in the evidence as to exactly when Noriega became a government informant, the answer to that question is not as significant as Young suggests. His reliance on *United States v. Chase,* 372 F.2d 453 (4th Cir.), *cert. denied,* 387

U.S. 907, 87 S.Ct. 1688, 18 L.Ed.2d 626; 387 U.S. 913, 87 S.Ct. 1701, 18 L.Ed.2d 635 (1967), is misplaced. That case stands for the proposition that "one who acts as a government agent and enters into a purported conspiracy in the secret role of an informer cannot be a co-conspirator." *Id.* at 459, *citing Sears v. United States,* 343 F.2d 139 (5th Cir. 1965). The rule applies in situations where the conspiracy involves only a defendant and a government informer. In that situation there can be no conspiracy because it takes two to conspire and the government informer is not a true conspirator. *Sears, supra.*

[101] The conspiracy involving Young included others besides Noriega. For example, Young conspired with John Fisher. His position is not governed by the rule of *Sears;* rather, it comes within the ambit of the rule stated in *Sigers v. United States,* 321 F.2d 843, 848 (5th Cir. 1963), that "a conspiracy may be proved even though the link connecting many of the activities of the conspirators is a Government informer." *See also United States v. Klein,* 560 F.2d 1236 (5th Cir. 1977), *cert. denied,* 434 U.S. 1073, 98 S.Ct. 1259, 55 L.Ed.2d 777 (1978).

Young argues that justice demands that his convictions on the mail fraud counts, Counts 34 and 35, be reversed because there was no evidence to show that he asked, requested or insisted that the insurance agent use the mails in processing the claim. Further, since John Fisher filed the claim, Young denies any responsibility for the fraud.

[102] This argument is not persuasive. As noted earlier, it was not necessary that Young actually do the mailing or instruct another to use the mails in order to be guilty of mail fraud. An individual participant in a scheme encompassing mail fraud will be liable for the acts of his co-schemers when such acts are within the general scope of

the scheme. He can disclaim responsibility only if he undertakes some affirmative act of withdrawal. *Rodgers, supra.*

[103, 104] Furthermore, it is well settled that one "causes" the use of the mails when he does some act in which it is reasonably foreseeable that the mails will be used. *United States v. Crockett,* 534 F.2d 589 (1976). Because Young was in the insurance business, it cannot seriously be contended that he was unaware that the mail would probably be used in processing a claim. The evidence showed that Young was part of the scheme to burn the N. Armenia Street property and recover the insurance proceeds. The convictions of Young are affirmed.

Joseph C. Russello:

Russello stands convicted on Counts 1, 2, 28 and 29 as a result of the burning of an office building owned by him on W. Kennedy Boulevard in Tampa. He argues that his convictions must be reversed because the evidence did not show that he was associated with an enterprise through a pattern of racketeering activity. He contends that at most the evidence showed that in connection with the fire, Noriega and Carter were acting independently of each other and independently of the "enterprise." Russello denies any knowledge of the existence of an enterprise as charged in this case. Furthermore, he argues that his two mail fraud convictions do not qualify as a pattern of racketeering activity because they arose out of a single mail fraud scheme and resulted in two separate convictions only because two mailings happened to occur.

[105, 106] We find the evidence sufficient to support the jury's verdicts. Russello's association with Noriega, initially, and then with Carter, supports the inference that he was associated with the enterprise. The enterprise was a

group of people who shared the common goal of burning buildings and collecting fire insurance proceeds, and who worked together to achieve that goal. Certainly every member of the group was not involved in every transaction, but every transaction was part of the overall workings of the enterprise to which every member belonged. That Carter and Noriega acted independently in dealing with Russello does not mean that they were not working on behalf of the enterprise. The record reveals sufficient evidence from which the jury could infer that Russello's actions with members of the enterprise qualified as participating in the conduct of the affairs of the enterprise. As we stated in *Elliott:* "Under the statute, it is irrelevant that each defendant participated in the enterprise's affairs through different, even unrelated crimes, so long as we may reasonably infer that each crime was intended to further the enterprise's affairs." 571 F.2d at 902-03.

Russello proposes several other issues which have been raised unsuccessfully by his co-defendants. Russello's challenges of his RICO convictions are without merit. We affirm Russello's convictions on Counts 1 and 2.

[107] With respect to the mail fraud convictions, Russello insists that there is a fatal variance between the charge in the indictment and the evidence. Arguably there is some merit to this contention, but we do not find the variance of such substance as to warrant reversal. The indictment charges that Russello, Lazzara, Carter and Noriega devised a scheme to defraud the insurance company by filing a proof of Loss stating they did not know who set the fire. The government offered evidence that the parties involved knew Noriega had set fire to the building. Testimony also indicated that the building's value listed on the claim was inflated. Russello argues that he was convicted of mail fraud on the latter basis, one not specifically

charged in the indictment, and his conviction should be reversed. We disagree. We are not persuaded that the convictions were based on misrepresentation as to value. The reference to value in the testimony of a government witness was almost an aside. Russello offered experts who contradicted the government's suggestion of value. On the other hand the evidence abounds that Carter and Russello falsely denied knowing who set the fire. Russello's convictions on Counts 28 and 29 are affirmed.

CONCLUSION

The convictions of SCIONTI, MARTINO, MORGADO, MACALUSO, HOLT, LAZZARA, RODRIGUEZ, RUSSELLO, FARINA, BROWN, YOUNG, PALERMO, and FISHER, as per the verdicts of the jury, are AFFIRMED.

The convictions of GUARINO on Counts 17 and 18 are REVERSED; his convictions on all other counts are AFFIRMED.

The conviction of CHASE is REVERSED. The conviction of CHASE is REVERSED.

The convictions of LOSTRACCO on Counts 1, 2, 17 and 18 are REVERSED.

MOTION FOR NEW TRIAL

Docket Number 79-2606

Martino appeals from the denial of his post-conviction motion for a new trial based on newly discovered evidence. This evidence consisted of proffered testimony by co-defendant Guarino, who stated that he would have

testified for Martino in a separate trial but that he did not want to testify in his own defense at the joint trial.

[108] The criteria for obtaining a new trial on the basis of newly discovered evidence are:

1. the evidence must be discovered following the trial;

2. facts must be alleged from which the court may infer diligence on the part of the movant to discover the new evidence;

3. the evidence must not be merely cumulative or impeaching;

4. the evidence must be material; and

5. the evidence must be such that a new trial would probably produce a new result.

United States v. Rodriguez, 437 F.2d 940 (5th Cir. 1971).

Guarino's proffered statements related to the burning of four buildings. Guarino stated he never discussed burning any of those buildings with Martino and that Martino was unaware of Guarino's interests in the N. Nebraska Avenue and Columbus Drive properties. He also stated that while Martino was aware of Guarino's interests in the warehouse transaction, Noriega's interest was not disclosed to Martino. Guarino denied having ever paid a kickback to Martino, specifically with respect to the Columbus Drive transaction. During his sentencing hearing, Guarino stated to the court that he made a mistake in not testifying during the trial because Martino, contrary to some of the evidence, "didn't have nothing to do with Nebraska or 12th Street."

[109] Guarino's statements do not satisfy the criteria for the granting of a new trial. We need not decide

whether newly available evidence is the same as newly discovered evidence because we find that the "new" evidence is not such that a second trial would probably produce a different result. Guarino's statements concerning Martino's lack of knowledge and involvement with respect to the N. Nebraska fire would not produce a new result because Martino was acquitted on charges relating to that fire. The 12th Street warehouse fire was not the subject of a substantive charge; testimony concerning that incident related only to Martino's association with the enterprise. Guarino's statement that Martino knew that he, Guarino, and not Noriega was involved would not be contrary to a jury finding that Martino was associated with the enterprise. It would suffice that Martino and Guarino worked together on the warehouse fire. With respect to the Columbus Drive arson, we find that testimony concerning nondisclosure of Guarinos's interest in that property would not likely have changed the jury's verdict. Every member of the enterprise does not have to participate in every transaction engaged in by the enterprise. Furthermore, Guarino's denial of having paid a kickback to Martino for that property is not in direct contradiction to the testimony at trial; Noriega did not testify about a kickback, but rather that they bought out Martino's interest.

[110, 111] The decision to grant or deny a motion for new trial on the basis of newly discovered evidence rests in the sound discretion of the trial judge. We will reverse the denial of such a motion only where "it is shown that the ruling was so clearly erroneous as to constitute an abuse of discretion." *United States v. Antone,* 603 F.2d 566, 568 (5th Cir. 1979). That showing has not been made in this case.

The district court's denial of Martino's motion for new Trial is AFFIRMED.

FORFEITURE

Docket Number 78-3611

[112] The jury returned verdicts ordering the forfeiture of insurance proceeds collected by defendants Russello, Rodriguez, Martino and Guarino. Martino, Russello and Rodriguez appealed the forfeiture orders; Guarino did not[19] The issue, one of first impression in this court, is whether the term "interest" in 18 U.S.C. § 1963(a) includes income or receipts from racketeering activity.

Under 18 U.S.C. § 1963(a), a defendant convicted of violating RICO must:

> forfeit to the United States (1) any interest he has acquired or maintained in violation of Section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of Section 1962.

Rodriguez was ordered to forfeit $4,226,83, Russello's forfeiture was for $340,043.09, and Martino was ordered to forfeit $2,500 together with his ownership, interest and property rights in two companies. Ybor Loan Company and M & S Investment Corporation. The appellants' challenges to the forfeiture orders center on the definition of "interest" as used, but not defined, in the statute. The

---

[19]Guarino belatedly raises the issue in his brief on appeal of his conviction. This is not sufficient to vest appellate jurisdiction. The order of forfeiture is a different judgment from the sentence and commitment order. A separate notice of appeal was required.

government takes the position that income or profits from an illegal enterprise are forfeitable under § 1963; appellants contend that § 1963 applies only to an interest in an enterprise. Appellants' position is supported by decisions of other courts.

In *United States v. Meyers,* 432 F.Supp. 456, 461 (W.D.Pa.1977), the court indicated that it would be a "strained construction of Section 1963" to classify profits or fruits received from the enterprise as "interest" in the enterprise or as a claim or right that could afford a source of influence over the enterprise. The court went on to note that "the more natural interpretation is that an 'interest' is akin to a continuing proprietary right in the nature of partnership or stock ownership (or holding a debt or claim, as distinguished from 'equity' investment) rather than mere dividends or distributed profits." *Id.* This interpretation was approved by the court in *United States v. Thevis,* 474 F.Supp. 134, 142 (N.D.Ga. 1979), which held that "the limits of forfeiture authorized by 18 U.S.C. § 1963 do not embrace fruits or profits derived from the operation of a § 1962 enterprise." Several factors were considered by the court in reaching that conclusion. The different treatment Congress accorded income and interest was noted — § 1962(a) makes it illegal to invest income derived from racketeering activity in the acquisition of an interest in an enterprise. Congress recognized that income and profits could be generated by racketeering activity but it chose to include in the forfeiture provision only the interest acquired or held and not the income of an enterprise. The *Thevis* opinion also recognized that the "enterprise" concept is the basis of § 1962 and that the forfeiture provision is directed toward an interest acquired or maintained "in violation of Section 1962." Thus the existence of the enterprise is also a cornerstone of § 1963. The court

was convinced that the use of the word "interest" was limited to interest in the enterprise. Our colleagues of the Ninth Circuit, in a well-reasoned opinion, recently held that § 1963 applies to interest "in an enterprise" and not to any form of income or proceeds derived from a pattern of racketeering activity. *United States v. Marubeni America Corp.*, 611 F.2d 763 (9th Cir. 1980).

In reaching our conclusion we are impressed by several considerations. In enacting 18 U.S.C. § 1963, Congress permitted *in personam* forfeitures that had previously been prohibited by 18 U.S.C. § 3563. Viewed in that perspective one would expect that Congress would strictly limit forfeitures. In this instance the limitation would be to the defendant's interest in the enterprise he had corrupted. Such an intent was indicated by the comments of Deputy Attorney General Richard P. Kleindienst before the Senate Subcommittee on Criminal Laws and Procedures when he said:

> It is felt that this revival of the concept of forfeiture as a criminal penalty *limited as it is in* § 1963(a) to one's interest in the enterprise which is the subject of the specific offense involved here, and not extending to any other property of the convicted offender, is a matter or congressional wisdom rather than of Constitutional power . . . . (Emphasis in original).

Forfeiture under 18 U.S.C. § 1963 – RICO's Most Powerful Weapon, 17 Am.Crim.L.Rev. 379, 385 (1980), *quoting* Measures Relating to Organized Crime, Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary, 91st Cong., 1st Sess. 66 (1969). Furthermore, had Congress intended to include fruits and profits, it could have specifically

provided for its, it could have specifically provided for such as it did in the Comprehensive Drug Abuse Prevention and Control Act of 1970, passed by the same Congress in the same month as RICO. 21 U.S.C. § 848(a)(2) states: "Any person who is convicted under paragraph (1) of engaging in a continuing criminal enterprise shall forfeit to the United States – (A) *the profits* obtained by him in such enterprise . . . ." (Emphasis added.)

[113] We are convinced Congress did not intend to include in the forfeiture provision of § 1963 the fruits and profits obtained from a pattern of racketeering activity. We are aware this holding occasions problems with respect to associations in which one cannot own a legal interest, as in the case subjudice. This limitation was recognized by the Justice Department when it stated that "there is often nothing to forfeit . . . in the case of individuals associated in fact." *Forfeiture under 18 U.S.C. § 1963 – RICO's Most Powerful Weapon, supra* at 391, *quoting* U.S. Department of Justice, Explanation of the Racketeer Influenced and Corrupt Organization Statute 2 (4th ed.). The kind of enterprise will, therefore, be critical in the determination of forfeitable interests.

[114] Having concluded that only interests in an enterprise are subject to forfeiture, we reverse the monetary forfeiture orders against Russello, Rodriguez and Martino. The insurance proceeds they received from the burning of their properties were proceeds or profits from the enterprise; the proceeds did not constitute "interest in an enterprise."

[115] We affirm the order of forfeiture of Martino's interest in his two companies because it falls squarely within the language of § 1963(a)(2) which provides for the forfeiture of any interest affording a source of influence

over the enterprise. Both of Martino's companies were active in the enterprise. They provided funds for the arson and fraud ventures. The M & S Investment Corporation purchased property with the intent to burn it, but sold the property to someone else who then burned it. Martino was an active participant; he played an important role within the enterprise, a role made even more effective because of the companies he managed. The Act requires forfeiture of his interest in these companies.

The orders of monetary forfeiture entered against Martino, Russello and Rodriguez are REVERSED. The order of forfeiture of Martino's interest in Ybor Loan Company and M & S Investment Corporation is AFFIRMED.

APPENDIX

As noted below, some fires were listed only as overt acts and/or acts of racketeering in Counts 1 and 2 while others were also the subjects of mail fraud counts (Counts 3 through 35). We list only those fires that are at the core of the convictions appealed. All addresses are in Tampa, Florida, unless otherwise indicated.

1. 1202 E. Buffalo Avenue, a bakery (Counts 1 and 2) — Guarino and Scionti burned the premises with the help of two other arsonists who died as a result of the fire.
2. 3401 24th Street (Counts 1 and 2) — Guarino, Noriega and Scionti burned a frame house owned by Scionti in his brother's name. Scionti received a $4,000 settlement on the insurance policy.
3. 1811 Taliaferro Street (Counts 1, 2, 3 and 4) — Guarino, Noriega and Scionti burned a frame house belonging to Palermo and Guarino (silent partner).

This house was burned twice; insurance proceeds were collected by Palermo both times. The first time he collected on a policy transferred to him when he bought the house. After the first fire, he made cosmetic repairs to the house and obtained insurance coverage through a different agency. After the second fire, he collected the full face value of this policy, $1,000.

4. 20410 Old Cutler Road, Miami (Counts 1, 2, 5 and 6) – Guarino, Scionti and Noriega burned a laundromat belonging to Lazzara. Lazzara received only $15,117 although he submitted a claim for $40,000.

5. 2208 10th Street and 923 12th Avenue (Counts 1, 2, 7 and 8) – Guarino, Noriega and Macaluso burned two adjacent frame buildings owned by Rodriguez. $4,226.83 was collected by Rodriguez through the help of Carter.

6. 2917-2917 1/2 20th Avenue (Counts 1, 2, 9 and 10) – Noriega and Guarino burned a frame house owned by Farina in his mother's name. Farina received $4,000 in insurance proceeds.

7. 3006 No. Nebraska Avenue (Counts 1, 2, 11, 12 and 13) – Macaluso bought a house from Noriega and had Guarino and Noriega burn it. With help from Carter, $23,000 in insurance proceeds was paid to Macaluso.

8. 2020 E. Columbus Drive (Counts 1, 2, 14, 15 and 16) – Noriega and Guarino burned a frame house acquired by Noriega through the assistance of Martino. With the help of Carter, $20,000 was paid on three different insurance policies, two purchased by Noriega and one transferred to him by the prior owner. The property was later burned again by Noriega and he collected an additional $7,105.77.

9. 2510 12th Street (Counts 1 and 2) – Martino purchased an option on a warehouse with the intent to insure it and then burn it. Necessary repairs were made in order to obtain insurance. Guarino and Noriega then bought the option from Martino then bought the option from Martino and put it in the name of Alex Fekete who exercised the option. An office was set up in the warehouse and a $50,000 insurance policy was obtained (in addition to the $30,000 policy transferred from the previous owner who retained a mortgage position for the credit portion of the sale). When more money was needed to cover repairs, Chase got a loan from a client who was given a second mortgage. Noriega burned the property. Fekete had allowed the additional insurance to lapse by failing to pay the premiums. The insurance recovery on the original insurance was paid to the first mortgage holder.

10. 2114 27th Street (Counts 1, 2, 17 and 18) – Fekete and Noriega burned an apartment owned by a relative of Lostracco (co-worker of Martino in his real estate business). A transfer of the property from Lostracco's brother-in-law to Jimmy Traina (straw man for Noriega and Guarino) was attempted but was not completed before the property was burned. The $4,500 in insurance proceeds was initially paid to Lostracco's brother-in-law, but was later delivered over to Noriega, Guarino and Arrigo.

11. 409 E. Oak Street (Counts 1, 2, 19 and 20) – Guarino and Noriega burned a two-story frame house owned by Guarino. The house had been "placarded" by city housing inspectors prior to the fire. Cosmetic repairs were made to the exterior of the house and with Carter's guidance, insurance was obtained. Following the fire the insurance company refused to

pay the face value of the policy. Carter intervened and arranged for a $10,000 settlement.

12. 3310 Vasconia Street (Counts 1, 2, 21 and 22) – Noriega and Arrigo burned a house owned by Holt. Morgado had made the necessary arrangements for Holt. When Holt acquired the property he transferred the existing policy and obtained additional coverage. The first attempt at burning the house was unsuccessful; in the second attempt the building was totally destroyed. Holt claimed $41,501.55 under one policy and $36,501.55 under another.

13. 4601 W. Kennedy Boulevard (Counts 1, 2, 28 and 29) – Noriega and Traina set fire to the Central Professional Building owned by Russello. Insurance coverage on the premises paid $340,043.09 through adjustments made by Carter.

14. 3012 Highland Avenue (Counts 1 and 2) – Guarino and Noriega attempted to burn a frame apartment building owned by an acquaintance of Guarino. The fire was spotted by neighbors and extinguished prior to extensive damage.

15. 3658 S. Westshore Boulevard (Counts 1, 2, 31 and 33) – Noriega burned a True Value Hardware Store owned by Bill Brown. Prior to the fire, Brown had obtained $175,000 in additional insurance with the help of Carter. The fire was only partially successful, and though Brown claimed damages of over $100,000, the insurance company estimated the damages at only $15,000 and refused to pay the claim.

16. 1907-1915 N. Armenia Avenue (Counts 1, 2, 32 and 33) – This property was acquired by Fisher and Young through arrangements made by Noriega. After

superficial repairs were made, insurance coverage was obtained. The building was heavily damaged by fire and $125,000 was collected from the insurance company.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-5260

UNITED STATES OF AMERICA
Plaintiff-Appellee

versus

JOSEPH D. LAZZARA
Defendant-Appellant

PETITION FOR REHEARING

Pursuant to Rule 40 of the Federal Appellate Rules, Joseph D. Lazzara seeks rehearing in this cause. For grounds, Lazzara would show that this court has overlooked or failed to consider the following:

I

Two days prior to the filing of the opinion in this case, the United States Supreme Court rendered its decision in *United States v. Turkette,* ____U.S.____, 29 CrL 3086 (6/17/81). In *Turkette,* supra. The Court determined that the RICO statute reached both licit and illicit enterprises. However, the Turkette court also opined:

> "In order to secure a conviction under RICO, the Government must prove both the existence of an

> 'enterprise' and the connected 'pattern of racketeering activity.' The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct. The pattern or racketeering activity is, on the other hand, a series of criminal acts as defined by the statute. 18 U.S.C. § 1961(1). The former is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. The latter is proved by evidence of the requisite number of acts of *racketeering committed by the participants of the enterprise.* While the proof used to establish these separate elements may in particular cases coalesce, proof of one does not necessarily establish the other. The 'enterprise' is not the 'pattern of racketeering activity'; it is an entity separate and apart from the pattern of activity in which it engages." (Emphasis supplied). *Turkette,* supra., at 3088.

The charged enterprise in Turkette, like the charged enterprise in this case was an association in fact for the purpose of committing illegal acts under specified general categories of racketeering activity. *Turkette,* supra., at 3087. Under Turkette, such an enterprise must be composed of "a group of persons associated together for a *common purpose* of engaging in a course of conduct." However, under the issue litigated in *Turkette,* supra., it was not necessary for the court to determine the specific common purpose shared by the associates comprising that enterprise. Under the issues presented in this case, it is necessary to isolate the specific common purpose shared by the associates of the enterprise in order to isolate the enterprise.

It should be self-evident that the more people charged as associates comprising the enterprise, the more difficult it will become to isolate the specific common purpose shared by all. It should also be self-evident that the inclusion of peripheral persons as associates comprising the enterprise renders the isolation of a specific common purpose more difficult. In this case, the difficulty in isolating the enterprise is compounded both by the sheer number of associates alleged to comprise the enterprise and by the number of peripheral persons included in that large number.

It may be persuasively argued in this case that the central figures had a common purpose of engaging in a course of conduct involving any and all acts of racketeering activity charged in the indictment and that, hence, the central figures comprised the enterprise. This was the factual setting found in *United States v. Elliott,* 571 F2d 880, 898 (5th Cir. 1978). However, it may not be persuasively argued that peripheral defendants in this case, specifically, *the dissatisfied owners* like Joe Lazzara, shared any specific common purpose to engage in any and all acts of racketeering activity. The evidence in this case establishes, at best, that the dissatisfied owners like Lazzara, had a much narrower purpose of profiting from arson on property which they owned. Under *Turkette,* supra., dissatisfied owners like Lazzara are not sufficiently associated with nor are they associates of the enterprise.

Under *Turkette,* supra., proof of the enterprise is accomplished "by evidence of an ongoing organization, formal or informal and *by evidence that the various associates function as a continuing unit*". Lazzara and the other dissatisfied owners didn't function as part of a continuing unit any more than customers of a grocery store function as part of that commercial enterprise.

Under *Turkette,* supra., the association of a customer with the enterprise is not the kind of association which generates liability under the RICO statute.

It must be remembered that the alleged customers are subject to arson prosecution in state court and mail fraud prosecution in federal court. Lazzara only submits that under *Turkette,* supra. He cannot be convicted under counts 1 and 2 because, as a customer he was neither an associate of the enterprise nor sufficiently associated with the enterprise.

II

On two occasions in this opinion [P. 8243 & 8267], this court overlooked or misapprehended Lazzara's position relating to the phrase "conduct or participate in the conduct of the enterprise's affairs". Lazzara never suggested that the term "conduct" was illusory or mysterious. To the contrary, Lazzara directed this court to the surviving portion of the panel opinion in *United States v. Mandel,* 591 F2d 1347, 1374-76 (4th Cir. 1979). In *Mandel,* supra., the court determined that conduct means to manage or *operate.* Curiously, the only RICO case cited to the court which addressed the proper construction of the term conduct was omitted from the opinion. Instead, this court turned to *United States v. Tucker,* 638 F2d 1292 (5th cir. 1981) as authority for the proposition that those who perform activities *necessary or helpful to the operation* of the enterprise conduct it. There is nothing inconsistent between *Tucker,* supra., and *Mandel,* supra. While it is true that Tucker was a 18 U.S.C. § 1955 case and Mandel was a 18 U.S.C. § 1962 case, both address the meaning of the term conduct and both statutes arose from the same piece of legislation.

Absolute reliance on *Tucker,* supra., is misplaced under the circumstances of this case. In *Tucker,* supra., it was never suggested that the waitress was a customer (mere bettor), hence, the Tucker court did not determine whether a customer conducted the gambling business. The internal authority cited in *Tucker,* supra., did address that issue and uniformly determined that a customer (mere bettor) does not conduct the business. *United States v. Avarello,* 592 F2d 1339 (5th Cir. 1979); *United States v. McCoy,* 539 F2d 1068 (5th Cir. 1975); *Sanabria v. United States,* 437 U.S. 54, 98 S.Ct. 2170 (1978). Furthermore, *Tucker,* supra., clearly points out that non-employees of the enterprise must perform a *necessary activity* to the operation of the enterprise in order to conduct the enterprise, while employees need only conduct activities helpful to the operation of the enterprise. Since Lazzara was not an employee of the enterprise, he would have to perform a necessary activity to the operation of the enterprise other than that performed by a customer. Lazzara performed no such necessary activity.

Lazzara, relying on decisions of this court, again asserts that "to conduct or participate in the conduct of the enterprise's affairs" a person must participate in the management, control, or operation of the enterprise. Again, relying on the decisions of this court, Lazzara asserts that a customer of the enterprise does not participate in the conduct of the enterprise's affairs because he does not participate in the management, control or operation of the enterprise's affairs. If basic principles of due process are to be adhered to, the term conduct cannot mean two different things when used in similar context with one piece of legislation.

Lazzara recognizes that this court specifically determined in this case, that customers participate in the con-

duct of the enterprise's affairs under 18 U.S.C. § 1962, even though they do not do so under 18 U.S.C. § 1955. Specifically, this court opined:

> "Congress decreed that by committing two of the designated predicate crimes related to the affairs of the 'enterprise', a person participates in the enterprise and thus violates RICO. As distinguished from the Travel Act, 18 U.S.C. § 1952, and the provision relative to illegal gambling businesses, 18 U.S.C. § 1955, both of which do not reach customers, 18 U.S.C. § 1962 does contemplate the prosecution of those 'customers' who engage in a pattern of racketeering activity in furtherance of the affairs of the enterprise. By definition such a person becomes more than a customer of the enterprise." *United States v. Martino,*____F.2d____, No. 78-3611, 78-5260, and 79-2606 (June 19, 1981) [at 8268].

This court cites no real authority for this proposition. In reaching this conclusion, this court determined that participation in the enterprise's affairs through two predicate crimes is all that is required. In reaching this conclusion, this court again ignores the phrase "conduct or participate in the conduct". If a person who places two bets with an illegal gambling business does not conduct that business under 18 U.S.C. § 1955, Lazzara fails to see how a person who places two bets with that same business can conduct the enterprise under 18 U.S.C. § 1962. This is exactly what will result under the above quoted portion of the Martino opinion. A customer does not automatically conduct the enterprise or participate in the conduct thereof by simply committing two acts of gambling, mail fraud or arson.

III

As explained in the initial brief, the evidence in the light most favorable to the government indicates that Lazzara hired Noriega to set fire to Lazzara's Miami laundromat. Such evidence indicates that Lazzara was a customer of the enterprise and not an associate of nor sufficiently associated with the enterprise. Unlike many of the other fires in this case, Lazzara allegedly paid Noriega $1500.00 the day after the fire. Only Lazzara received the insurance proceeds from this fire. No proceeds went to the enterprise. Since Lazzara alone profited from the alleged mail frauds which resulted from the Miami fire and since no person associated with the enterprise procured, processed or submitted the insurance claim, the alleged mail frauds were Lazzara's personal affairs and not the affairs of the enterprise. Since the mail frauds cannot be imputed to the enterprise, they will not support a conviction under 18 U.S.C. § 1962. *Martino,* supra., at 8264.

IV

At P. 8254-8255 of the Martino opinion, this court addressed Point II of Lazzara's brief. Under Point II, Lazzara documented the importance of the hearsay statements of Hiram McElroy, isolated the exception to the hearsay rule which permitted their introduction and cited *Gichler v. Troiano,* 410 F2d 238, (D.C. Cir. 1969), in support of his argument. In *Gichler,* supra., at 242, Fauld made a statement that he and his friends were smoking. Fauld never admitted that careless smoking caused the fire. The court ruled that Fauld's hearsay statement should have been admitted because Fauld's statement indicates that he did something which may have caused the fire. Inexplicably, this court overlooked or ignored *Gichler,* supra., and summarily rejected Lazzara's claim on the basis of the

language contained in the exception. Specifically, this court determined that under Rule 804(b)(3), "the statement against interest must be almost a direct, outright statement that the person was legally at fault". Understandably, the court cited no case law for this novel and erroneous proposition.

Rule 804(b)(3) generates a reasonable man standard. The statement must only be sufficiently against interest so that a reasonable man would to have made it unless he believed the statement to be true. See Weinstein, *Evidence,* Vol. 4, 804-90-102. It is the belief of a reasonable man which gives the statement its reliability in spite of its hearsay nature. No reasonable man known to Lazzara would have made McElroy's statement unless he believed it to be true.

The McElroy declaration was highly relevant evidence in Lazzara's case. The declaration was relevant because it clearly established that McElroy was at the laundromat when the fire started. The declaration contradicted Noriega's testimony that McElroy was taken to the bus station prior to the fire. [Vol. 49, p. 41]. Hence, the declaration directly impeached a portion of Noriega's explanation of the events surrounding the Miami fire.

The declaration was also relevant for substantive purposes. The statement tended to establish an alternative explanation for the origin of the fire. McElroy's declaration to his mother tended to prove that the origin of the fire was accident, not arson. Admittedly, Lazzara suggested accident as the cause of the fire when he testified that McElroy came into the Castaway's after the fire to explain and apologize. [Vol. 27, p. 26-29]. However, Mrs. McElroy's testimony was not colored by self interest and hence had far greater import to the defense's case. By sus-

taining the government's objection and striking the testimony of Ruth McElroy, the trial court committed prejudicial and reversible error.

V.

After expressing that this court was keenly aware of the substantial risks of manifest unfairness resulting from joint trials of this magnitude, this court nevertheless failed to reverse and order manageable trials of these defendants. [8247-8249]. The court, in the final analysis, turned to the verdicts returned by the jury and the time spent in deliberation as the dispositive considerations mandating the conclusion that a joint trial was proper. This court considered only those verdicts supporting its joint trial conclusion. This court overlooked or failed to consider those verdicts militating against a joint trial. Specifically, the jury returned five guilty verdicts [one for Chase and four for Lostracco] which this court found erroneous *as a matter of law*. These five erroneous verdicts did not enter into this court's severance analysis. Furthermore, this court failed to consider the logical deficiency surrounding the acquittal of Rivera. Counts 5 and 6 were "mail fraud" counts and were premised upon the fire occurring at Lazzara's Miami laundromat. Those "mail fraud" counts were also alleged as qualifying offenses under Count 2 and they evidenced the conspiracy under Count 1. The only evidence that Lazzara was a party to this purported arson came from the testimony of Willie Noriega. Noriega's testimony implicated both Rivera and Lazzara. According to Noriega, Rivera's role was more pervasive than Lazzara's. The jury acquitted Rivera on Counts 1, 2, 5 and 6 and convicted Lazzara, even though Lazzara testified and denied complicity while Rivera did not testify. These "inconsistent verdicts" are poignant evidence of the type of "juror confusion" around which Lazzara's severance claim revolved. This confu-

sion was undoubtedly magnified by the "spill-over effect" which naturally accompanies a trial of this nature.

Again, the jury verdicts in this case document Lazzara's suggestion that the jury was confused by the mass of evidence presented to it. In a case as close on the facts as Lazzara's was, such confusion prejudices Lazzara to the degree necessary to sustain his abuse of discretion theory.

This court stated [8248] that it does not encourage mass trials and at [8249] that the defendants' came close to meeting their severance burden in this cause. It is respectfully submitted that if severance is not required on these facts, it will never be required. Stating that mass trials are not encouraged is meaningless rhetoric unless this court is willing to act in a case as extreme as this. So long as skilled prosecutors in complex cases have the foresight to include "throw away" defendants in their indictments, marginal defendants will find no meaningful protection under Rule 14 of the Federal Rules of Criminal Procedure. It is time to draw the line and this case is certainly an appropriate place to do so under *Kotteakos v. United States,* 328 U.S. 750, 66 S.Ct. 1239 (1946)

VI

Lazzara specifically adopts all arguments presented in the Petitions for Rehearing of the other co-defendants in this case.

CONCLUSION

WHEREFORE, the undersigned respectfully request that rehearing be granted, that the opinion of this case be withdrawn and that Lazzara's judgments and sentences be reversed.

Respectfully submitted,

_____

Barry A. Cohen

_____

Richard G. Pippinger

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by mail to Sara Criscitelli, Appellate Section, Criminal Division, U.S. Department of Justice, Washington, D.C., 20531; and to all other counsel on this the 2nd day of July, 1981.

_____

Richard G. Pippinger

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff-Appellee,

versus Case No. 78-5260

JOSEPH D. LAZZARA
Defendant-Appellant.

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that there are no interested parties to this action other than the co-defendants in this cause.

Richard G. Pippinger
Attorney for Joseph D. Lazzara

CERTIFICATE

I express a belief, based upon a reasoned and studied professional judgment that this appeal involves one or more questions of exceptional importance. Specifically:

1. Whether mere customers of a racketeering enterprise are criminally liable under 18 U.S.C. § 1962.

2. Whether any statement against interest under Rule 804(b)(3) of the Federal Rules of Evidence must be a direct outright statement that the person was legally at fault before it is admissible in evidence.

Richard G. Pippinger
Attorney for Joseph D. Lazzara

STATEMENT OF ISSUES

1. Whether mere customers of a racketeering enterprise are criminally liable under 18 U.S.C. § 1962.

2. Whether any statement against interest under Rule 804(b)(3) of the Federal Rules of Evidence must be a direct outright statement that the person was legally at fault before it is admissible in evidence.

COURSES OF PROCEEDINGS AND DISPOSITION IN COURT BELOW

On June 8, 1977, a 35 Count Indictment was filed in District Court, Tampa, Florida charging Lazzara and

others with conspiracy, racketeering and mail fraud. Lazzara was charged in Count 1 with conspiracy to conduct and to participate in the conduct of the affairs of an enterprise through a pattern of racketeering activity [Section 1962(d) of Title 18]. Lazzara was charged in Count 2 with racketeering in that he did conduct or participate in the conduct of the affairs of an enterprise through a patter of racketeering activity [Section 1962(c) of Title 18]. Lazzara was charged in Count 5 with the crime of mail fraud involving a letter which was mailed by Lazzara's attorney to Allstate Insurance Company concerning an insurance claim on the "Miami laundromat fire". Lazzara was charged in Count 6 with the crime of mail fraud involving a claim review report for the "Miami laundromat fire" mailed by Curt Blocker, Commercial Claims Director, Allstate Insurance Company to the Allstate Insurance Company Home office. Lazzara was charged in Count 28 with the crime of mail fraud involving a property adjustor's first report on the "Central Professional Building fire" which was mailed by Joseph Carter to Cincinnati Insurance Company. Lazzara was charged in Count 29 with the crime of mail fraud involving a draft for the "Central Professional Building fire" mailed by Cincinnati Insurance Company to Poe and Associates. [See Vol. #1, Item 1].

After trial by jury, Lazzara was found guilty of Count 1 [Conspiracy], Count 2[Racketeering]. Count 5 [Mail fraud, Miami laundromat fire] and Count 6 [mail fraud, Miami laundromat fire]. Lazzara was found innocent on Count 28 [Mail fraud, Central Professional Building fire], and Count 29 [Mail fraud, Central Professional Building fire]. [See: Vol. 4, Item 394].

Lazzara was adjudged guilty on the charge returned under each guilty verdict. On April 21, 1978, Lazzara was

sentenced to a 10 year term of imprisonment on Count 1, a 10 year term of imprisonment on Count 2, a 5 year term of imprisonment on Count 5, and a 5 year term of imprisonment on Count 6. These terms of imprisonment were all to run concurrently with each other. [See: Vol. 4, Item 460].

STATEMENT OF THE FACTS

The prosecution's first key witness against Lazzara was Willie Noriega. Noriega was a professional arsonist between 1973-1976. [Vol. 53, p. 741-742]. According to Noriega, he was approached in September, 1973 by John Rivera. Rivera offered Noriega an opportunity to burn a laundromat in Miami, Florida. This meeting occurred at the Castaway's Lounge in Tampa, Florida.[1] Also present at this meeting was Guarino. Noriega ultimately agreed to burn the Miami laundromat [Vol. 49, p. 32-35].

Rivera told Noriega that the manager of the laundromat was a conscientious employee. To eliminate this problem, Rivera and Noriega agreed to transport McElroy to the Miami laundromat. McElroy was to work at the laundromat. The men believed that McElroy would cause the conscientious manager to leave her job. [Vol. 49, p. 32-44].

According to Noriega, McElroy was transported to Miami by Noriega, Guarino and Rivera. Noriega testified that Lazzara gave him a map showing the location of the laundromat. Lazzara owned the laundromat. Noriega testified that Lazzara told him that the laundromat was losing money and that he [Lazzara] wanted the business burned [Vol. 49, p. 32-44].

---

[1]The Castaway's Lounge was owned by Lazzara and managed by Rivera [Vol. 49, p. 34-35]

In October, 1973, Noriega, Guarino and Scionti returned to Miami and took McElroy to the bus station. The trio then returned to the laundromat, used a key to enter the back door and burned the building. Noriega claimed that shortly after starting the fire, he called Rivera and informed Rivera that the laundromat had burned. [Vol. 49, p. 32-44].

Noriega testified that he met Lazzara and Rivera at the Castaway's Lounge on the following day. According to Noriega, Lazzara gave Rivera money. Rivera and Noriega then went to a Lum's restaurant to count the money [Vol. 49, P. 32-44].

Noriega claimed that he received $1,500 that day. Noriega testified that he expected to receive a total of $4,000, however, additional funds were never received [Vol. 49, p. 32-44].

According to Noriega, he was approached about burning a second building during 1975. During that year, Noriega and Russello discussed burning the Central Professional Building.[2] An agreement was reached and shortly thereafter, Noriega burned the building. Lazzara's station wagon was also consumed in the fire [Vol. 50, p. 246-274].

Prior to burning this building, Noriega allegedly told Lazzara of his plan. On this occasion, Noriega claimed that Lazzara told him that the station wagon was defective and he [Lazzara] would like to burn the vehicle. Noriega testified that he agreed to place the station wagon near the building so that both the building and the vehicle could be consumed by the fire [Vol. 50, p. 246-274]

---

[2]This building was next door to the Castaway's Lounge [Vol. 50, p. 251].

Noriega claimed that a container of gasoline, used to start the fire at the office building, was taken from a shed at the Castaway's Lounge. According to Noriega, Lazzara knew that the shed was being used by Noriega to store gasoline [Vol. 50, p. 246-274].

The prosecution's key witness against Lazzara was Joseph Carter. Carter was an insurance adjuster for 20 years, specializing in fire claims [vol. 56, p. 4-6]. Carter was introduced to Lazzara at the Castaway's Lounge by Noriega while Carter was acting as the insurance adjuster for the Central Professional Building fire. Carter asked questions about Lazzara's burned vehicle so that he [Carter] could put the information in his file. During the conversation, Lazzara purportedly discussed future ventures relating to the burning of buildings. During this conversation, Lazzara purportedly admitted giving Noriega his [Lazzara's] station wagon to burn. The burning of a bar owner's car was supposed to provide a cover for the burning of the building. [Vol. 56, p. 107-109].[3]

The government's third key witness against Lazzara was David Morash. Morash was an employee of Allstate Insurance Company. Allstate insured the Miami laundromat. Morash identified two documents which traveled through the mails and which were related to Lazzara's insurance claim [Conjo, Inc.]. Neither letter was actually mailed by Lazzara [Third Supp. Record, Vol. 1, p. 1-20].

The government's final key witness against Lazzara was James McAuley. McAuley was an investigator for the Dade County [Miami] Fire Department, McAuley investigated the Miami laundromat fire. MCAuley identified

[3]Noriega did not recall this conversation during his testimony.

a hot plate taken from the burned laundromat. A plastic container had melted on top of this plate [Third Supp. Record, Vol. 6, p. 1-22].

Lazzara's Defense

The defense's first key witness was Lazzara. Lazzara testified that he purchased the Miami laundromat in 1969 for $42,300. He purchased a $40,000 insurance policy as security for the loan. The sales contract did not include purchase of the building which housed the laundromat [Vol. 27, p. 6-9].

Lazzara entered into an agreement in September, 1973, to sell the laundromat for $17,000.[4] Lazzara sent McElroy to Miami via the bus to help out until the sale could be accomplished. McElroy was to do the physical work while the manager continued to handle the money and the books [Vol. 27, p. 15-22].

The fire in the building occurred while McElroy was asleep in the back of the laundromat. McElroy admitted to Lazzara that be awoke after the fire started and fled the building. [Vol. 27, p. 27].

After the fire, Noriega approached Lazzara and asked to be paid for the fire. Lazzara sent Noriega on his way because he [Lazzara] had not asked Noriega to burn the business. [Vol. 27, p. 32-33].

On August 17, 1975, Lazzara's station wagon was burned during a fire at the Central Professional Building. Lazzara had no advance knowledge that the vehicle would be burned. [Vol. 27, p. 57-62].

---

[4]The insurance settlement was for $15,000 [Vol. 27, p. 29].

[5]McElroy was dead by trial date [Vol. 27 p. 34].

Lazzara denied storing gasoline in the shed behind the Castaway's. He also denied knowing that anyone else stored gasoline there [Vol. 27, p. 65-66].

Lazzara testified about his first and only meeting with Carter following the Central Professional Building fire. The meeting occurred at the package store attached to the Castaway's Lounge. Carter introduced himself as the adjuster for the building next door. Carter told Lazzara that Lazzara's car was responsible for the fire and that he [Lazzara] could be sued. At this point, Lazzara became angry and asked Carter to leave. Noriega was in hearing distance of the entire conversation [Vol. 27, p. 76-79].

Lazzara's second key witness was Oakes. In 1973, Oakes was a laundromat repairman in Miami. He serviced Lazzara's laundromat. In September, 1973, Oakes contracted to buy Lazzara's laundromat for $17,000. The laundromat burned before the deal could be concluded. Oakes testified that, at that time, a man lived in a back room of the laundromat. The man also used a hot plate [Vol. 26, p. 1-12].

Three witnesses testified that Lazzara's station wagon ran well prior to the fire [Vol. 26, p. 20-25, Matthews; Vol. 26, p. 28-31, Blesi; Vol. 26, p. 37-39, Fortin].

Lazzara's final key witness was Ruth Kennedy McElroy. Ruth McElroy was the mother of Hiram McElroy, the man Lazzara sent to Miami to work at the laundromat. Hiram McElroy went to Miami using traveling money supplied by Lazzara. Hiram McElroy returned to Tampa about one month after he left. Hiram McElroy told his mother that he was sleeping at the laundromat when an explosion occurred. Hiram suspected that the explosion was caused by a little stove which he may have left on. The Court ultimately sustained the prosecution's hearsay objection to this testimony and instructed the jury to disregard it [Vol. 35, p. 1-8].

ARGUMENT

I.

Customers of a Racketeering Enterprise are not Criminally Liable under 18 U.S.C. § 1962.

In *United States v. Anderson,* 626 F2d 1358; 1364, n8 (8th Cir. 1980) the court opined:

> "RICO initially was not very popular among prosecutors. The reluctance to use it no doubt stemmed in part from its complexity and the fear of unleasing a Pandora's box of statutory interpretation problems. Beginning in 1975, the United States Justice Department Task Force specializing in RICO toured the country, lecturing to United States Attorneys and their assistants on the use of RICO. Atkinson, *"Racketeer Influenced and Corrupt Organizations,"* 18 U.S.C. §§ 1961-68: *Broadest of the Federal Criminal Statutes,* 69 J.Crim.L. & Criminology 1, 3 n.21 (1978). After this promotional campaign, RICO has grown in popularity. Broad interpretation and simplistic resolution of the complicated statutory language pose the danger of enhancing this popularity beyond the intentions of Congress by bringing within the sphere of RICO minor offenses and by intruding on state power."

The concern expressed by the Anderson court is shared by every defense lawyer who has faced the ever expanding scope of the racketeering statute. Each appellate decision of this court since *United States v. Elliott* 571 F2d 880 (5th Cir. 1978) has moved closer to turning the "carefully crafted piece of legislation" referred to in *Iannelli v. United States,* 420 U.S. 770, 789; 95 S.Ct. 1284, 1295 (1975) into an arbitrary weapon to be used at the discre-

tion of federal prosecutors against persons who the prosecutors believe to be bad actors. In *Elliott,* supra. this court permitted the racketeering statute to be applied to "core conspirators" of an organization whose business was to profit from organized criminal activity. *Elliott,* supra., at 898. Using *Elliott,* supra., as a foundation a panel of this court has now decided that customers of an enterprise may be properly prosecuted under 18 U.S.C. § 1962. Specifically, the panel opined:

> "Congress decreed that by committing two of the designated predicate crimes related to the affairs of the 'enterprise,' a person participates in the enterprise and thus violates RICO. As distinguished from the Travel Act, 18 U.S.C. § 1952, and the provision relative to illegal gambling businesses, 18 U.S.C. § 1955, both of which do not reach customers, 18 U.S.C. § 1962 does not contemplate the prosecution of those 'customers' who engage in a pattern of racketeering activity in furtherance of the affairs of the enterprise. By definition such a person becomes more than a customer of the enterprise." *United States v. Martino,* ____ F.2d____, No. 78-3611, 78-5260, and 79-2606 (June 19, 1980). Martino at 8268.

The panel cites no real authority for this proposition. In reaching this conclusion, the panel determined that participation in the enterprise's affairs through two predicate crimes is sufficient contact with the enterprise to violate 18 U.S.C.§ 1962. In reaching this conclusion, the panel ignores a portion of the statutory language, specifically, the phrase: "conduct or participate in the conduct" of the enterprise's affairs. *Martino,* supra., is not the first occasion when this court ignored the same portion of the

statute. Another panel of this court plotted the same course in *Elliott,* supra.

Contrary to the dicta contained in *United States v. Elliott,* 571 F2d 880; 902-903 (5th Cir. 1978), the statute does not proscribe "participation in the enterprise's affairs". Rather, the statute proscribes "participation *in the conduct* of the enterprise's affairs". The Elliott court simply failed to give meaning to all of the applicable statutory language in 18 U.S.C. § 1962(c). This failure violates a basic rule of statutory construction.

> "It is an elemental rule of statutory construction that if a 'statute admits a reasonable construction which give effect to all of its provisions,' a court 'will not adopt a strained reading which renders one part a mere redundancy. See, e.g. *United States v. Menasche,* 348 U.S. 528, 538, 539 [75 S.Ct. 513, 519-520, 99 L.3d. 615].' Jareski v. J.D. Searle & Co., 1960 367 U.S. 303, 308-08, 81 S.Ct. 1579, 1582, 6 L.Ed2d 859, 863." *Meltzer v. Bd. of Pub. Inst. of Orange County,* 548 F2d 559; 578 n. 38 (5th Cir. 1977). Modified on other points 577 F2d 311.

See Also: *United States v. Brown,* 555 F2d 407; 415, n.15 (5th Cir. 1977). The importance of strictly adhering to the statutory language under 18 U.S.C.§ 1962 was recently emphasized by the United States Supreme Court in *United States v. Turkette,* 29 CrL 3086 (6/17/81).

On two occasions in the panel opinion [P. 8243 & 8267], this court overlooked or misapprehended Lazzara's position relating to the phrase "conduct or participate in the conduct of the enterprise's affairs". Lazzara never suggested that the term "conduct" was illusory or mysterious. To the contrary, Lazzara directed this court to the surviving portion of the panel opinion in *United States v.*

Mandel, 591 F2d 1347, 1374-76 (4th Cir. 1979). In *Mandel,* supra., the court determined that conduct means to manage or *operate.* Curiously, the only RICO case cited to the court which addressed the proper construction of the term conduct was omitted from the opinion. Instead, this court turned to *United States v. Tucker,* 638 F2d 1292 (5th Cir. 1981) as authority for the proposition that those who perform activities *necessary or helpful to the operation* of the enterprise conduct it. There is nothing inconsistent between *Tucker,* supra., and *Mandel,* supra. While it is true that Tucker was a 18 U.S.C.. § 1955 case and Mandel was a 18 U.S.C.§ 1962 case, both address the meaning of the term conduct and both statutes arose from the same piece of legislation.

Absolute reliance on *Tucker,* supra., is misplaced under the circumstances of this case. In *Tucker,* supra., it was never suggested that the waitress was a customer (mere bettor), hence, the Tucker court did not determine whether a customer conducted the gambling business. The internal authority cited in *Tucker,* supra., did address that issue and uniformly determined that a customer (mere bettor) does not conduct the business. *United States v. Avarello,* 592 F2d 1339 (5th Cir. 1975); *Sanabria v. United States,* 437 U.S. 54, 98 S.Ct. 2170 (1978). Furthermore, *Tucker,* supra., clearly points out that non-employees of the enterprise must perform a *necessary activity* to the operation of the enterprise in order to conduct the enterprise, while employees need only conduct activities helpful to the operation of the enterprise. Since Lazzara was not an employee of the enterprise, he would have to perform a necessary activity to the operation of the enterprise other than that performed by a customer. Lazzara performed no such necessary activity.

Lazzara, relying on decisions of this court, again asserts that "to conduct or participate in the conduct of the enterprise's affairs' a person must participate in the management, control, or operation of the enterprise. Again, relying on the decisions of this court, Lazzara asserts that a customer of the enterprise does not participate in the conduct of the enterprise's affairs because he does not participate in the management, control or operation of the enterprise's affairs. If basic principles of due process are to be adhered to, the term conduct cannot mean two different things when used in similar context with one piece of legislation.

Under *Turkette,* supra., the enterprise under the racketeering statute is an extremely broad entity. To illustrate, if a federal prosecutor chose to prosecute a gambling business under 18 U.S.C. § 1962 instead of 1955, he could define the gambling business in terms of virtualy every bookmaking operation in this nation by tying the business together with layoff bets. He could then include every bettor who made two or more bets with the enterprise and since these customers (bettors) "conduct or participate in the conduct of the enterprise's affairs under § 1962, they could be guilty of racketeering even though they wouldn't be guilty under 1955. There is not a football stadium in this nation big enough to conduct a trial involving such an enterprise, yet this is precisely the direction in which we are heading under *Elliott,* supra., and its progeny.

It is time to clean up the Elliott decision, give meaning to all the statutory language under 18 U.S.C. § 1962, and limit the racketeering statute to persons falling within the intended scope of that statute. Prosecution of customers should be left to statutes defining the acts of racketeering activity and not to the racketeering statute itself.

ARGUMENT

II

Whether any statements against interest under Rule 804(b)(3) of the Federal Rules of Evidence must be a direct outright statement that the person was legally at fault before it is admissible in evidence.

At P. 8254-8255 of the panel opinion, the court determined that the hearsay statements of Hiram McElroy were inadmissible. Lazzara isolated the exception to the hearsay rule which permitted their introduction and cited *Gichler v. Troiano,* 410 F2d 238 (D.C. Cir. 1969), in support of his argument. In *Gichler,* supra., at 242, Fauld made a statement that he and his friends were smoking. Fauld never admitted that careless smoking caused the fire. The court ruled that Fauld's hearsay statement should have been admitted because Fauld's statement indicates that he did something which *may have* caused the fire. Inexplicably, the panel overlooked or ignored *Gichler,* supra., and summarily rejected Lazzara's claim on the basis of the language contained in the exception. Specifically, this court determined that under Rule 804(b)(3), "the statement against interest must be almost a direct, outright statement that the person was legally at fault". Understandably, the panel cited no case law for this erroneous proposition.

Rule 804(b)(3) generated a reasonable man standard. The statement must only be sufficiently against interest so that a reasonable man would not have made it unless he believed the statement to be true. See Weinstein, *Evidence,* Vol. 4, 804-90-102. It is the belief of a reasonable man which gives the statement its reliability in spite of its hearsay nature. No reasonable man known to Lazzara would

have made McElroy's statement unless he believed it to be true.

To avoid reversing Lazzara's convictions, the panel misconstrued this rule of evidence. The potential for pervasive application of the panel's erroneous construction is reason enough to address the issue en banc and put to rest this erroneous construction of this important evidential principle.

CONCLUSION

Based on the foregoing arguments and authorities, Lazzara respectfully requests that rehearing en banc be granted, that the two important issues presented in this petition be addressed and that the judgments and sentences in his case be reversed.

Respectfully submitted,

BARRY A. COHEN, PA
100 Twiggs Street
Suite 4000
Tampa, Florida 33602
(813) 225-1655

Barry A. Cohen

Richard G. Pippinger

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by mail to Sara Criscitelli, Appellate Section, Criminal Division, U.S. Department of Justice, Washington, D.C. 20531, and to all counsel for co-defendants in this cause on this the 2nd July, 1981.

Richard G. Pippinger

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT B

NO. 78-5260

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

ROSARIO PALERMO, WILLIAM H. BROWN, a/k/a BILL, JOHN D. FISHER, ROBERT D. YOUNG, JOSEPH MACALUSO, a/k/a Joe, FRANK SCIONTI, JOHN NICHOLAS LOSTRACCO, SAM C. MARTINO, PAUL GUARINO, JIMMY FARINA, BERTON B. CHASE, a/k/a ROLAND RODRIGUEZ, JOSEPH D. LAZZARA, a/k/a JOE, JOSEPH C. RUSSELLO, a/k/a JOE, and AMALIA MORGADO.
Defendants-Appellants

No. 79-2606

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

SAM C. MARTINO,
Defendant-Appellant

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

ON PETITIONS FOR REHEARING
AND SUGGESTIONS FOR REHEARING EN BANC

Before TUTTLE, VANCE and POLITZ, Circuit Judges.

PER CURIAM:

The Petitions for Rehearing filed by the appellee, the United States of America, and by various of the appellants in the above entitled and numbered causes are DENIED, and no member of this panel nor judge of this court in regular active service having requested that the court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; local Fifth Circuit Rule 16), the suggestions for rehearing en banc are DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

Opposition

Office - Supreme Court, U.S.
FILED
FEB 19 1982
ALEXANDER L. STEVAS

Nos. 81-905, 81-907, 81-956, 81-5700, 81-5716, 81-5718, 81-5820, 81-5826, 81-5865

In the Supreme Court of the United States

OCTOBER TERM, 1981

JOSEPH D. LAZZARA, PETITIONER

v.

UNITED STATES OF AMERICA

SAM C. MARTINO, PETITIONER

v.

UNITED STATES OF AMERICA

JIMMY FARINA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

SARA CRISCITELLI
Attorney
Department of Justice
Washington, D.C. 20530
(202) 633-2217

[Case Names Continued on Inside Cover]

JOSEPH MACALUSO, PETITIONER

v.

UNITED STATES OF AMERICA

FRANK SCIONTI, PETITIONER

v.

UNITED STATES OF AMERICA

AMALIA MORGADO, PETITIONER

v.

UNITED STATES OF AMERICA

JOHN D. FISHER, PETITIONER

v.

UNITED STATES OF AMERICA

ROBERT D. YOUNG, PETITIONER

v.

UNITED STATES OF AMERICA

ROSARIO PALERMO, PETITIONER

v.

UNITED STATES OF AMERICA

QUESTIONS PRESENTED

1. Whether the district court abused its discretion in denying petitioners' severance motions.

2. Whether the evidence proved the single RICO conspiracy alleged in the indictment.

3. Whether property owners who arrange for a RICO enterprise to set fire to their buildings so that they can collect the insurance proceeds "participate, directly or indirectly, in the conduct of the enterprise's affairs," in violation of 18 U.S.C. 1962(c).

4. Whether persons who do not exercise management or control over an enterprise's affairs may be convicted under 18 U.S.C. 1962(c) for participating "directly or indirectly in the conduct of the enterprise's affairs through a pattern of racketeering activity."

5. Whether two separate "acts of racketeering activity" that form part of a single unlawful scheme may constitute a "pattern of racketeering activity" within the meaning of 18 U.S.C. 1961.

6. Whether 18 U.S.C. 1962(c) is unconstitutionally vague.

7. Whether the district court erred in excluding hearsay testimony concerning a statement of an unavailable witness, where that statement lacked the recognized indicia of reliability.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	4
Argument	6
Conclusion	18

TABLE OF AUTHORITIES

Cases:

Blumenthal v. *United States*, 332 U.S. 539	10
Colten v. *Kentucky*, 407 U.S. 104	15
Gichner v. *Antonio Troiano Tile & Marble Co.*, 410 F.2d 238	17
Glasser v. *United States*, 315 U.S. 60	10
Filesi v. *United States*, 352 F.2d 339	17
Opper v. *United States*, 348 U.S. 84	6
United States v. *Aleman*, 609 F.2d 298, cert. denied, 445 U.S. 946	15
United States v. *Armedo-Sarmiento*, 545 F.2d 785, cert. denied, 430 U.S. 917	10
United States v. *Boscia*, 573 F.2d 827	8
United States v. *Boyd*, 595 F.2d 120	10
United States v. *Boyd*, 610 F.2d 521, cert. denied, 444 U.S. 1089	7, 8
United States v. *Brooks*, 567 F.2d 134	7
United States v. *Edmonds*, 611 F.2d 1386	8
United States v. *Elliott*, 571 F.2d 880, cert. denied, 439 U.S. 953	12
United States v. *Harc Espinosa*, 619 F.2d 789	8
United States v. *Harris*, 542 F.2d 1283	8
United States v. *Harriss*, 347 U.S. 612	15
United States v. *Herman*, 589 F.2d 1191, cert. denied, 441 U.S. 913	15
United States v. *Luna*, 585 F.2d 1, cert. denied, 439 U.S. 852	7

Cases—Continued Page

United States v. *Lyles*, 593 F.2d 182, cert. denied, 440 U.S. 972 and 444 U.S. 847 6-7
United States v. *Mandel*, 591 F.2d 1347 ..... 12, 13
United States v. *Mazurie*, 419 U.S. 544 15
United States v. *Michel*, 588 F.2d 986, cert. denied, 444 U.S. 825 7
United States v. *Morelli*, 643 F.2d 402, cert. denied, No. 80-1748 (June 29, 1981) 15
United States v. *Pantone*, 609 F.2d 675 15
United States v. *Parness*, 503 F.2d 430, cert. denied, 419 U.S. 1105 14
United States v. *Powell*, 423 U.S. 87 15
United States v. *Rucker*, 586 F.2d 899 7
United States v. *Salomon*, 609 F.2d 1172 6
United States v. *Santoni*, 585 F.2d 667 8
United States v. *Swiderski*, 593 F.2d 1246, cert. denied, 441 U.S. 933 15
United States v. *Taylor*, 562 F.2d 1345 8
United States v. *Turkette*, No. 80-808 (June 17, 1981) 15
United States v. *Weisman*, 624 F.2d 1118, cert. denied, 449 U.S. 871 7
United States v. *Wofford*, 562 F.2d 582 8
United States v. *Zicree*, 605 F.2d 1381, cert. denied, 445 U.S. 966 8
Workman v. *Cleveland-Cliffs Iron Co.*, 68 F.R.D. 562 17

Constitution, statutes and rules:

United States Constitution, First Amendment 15
Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. 1961 *et seq.* 12
18 U.S.C. 1962(c) 4, 10, 11, 12, 13, 14
18 U.S.C. 1962(d) 4
18 U.S.C. 1963 4
18 U.S.C. 1341 4
18 U.S.C. 1955 12

Constitution, statutes and rules—Continued Page

Pub. L. No. 91-452, Section 904(a), 84 Stat. 947.... 12

Fed. R. Crim. P.:

Rule 8(a) 6
Rule 8(b) 6
Rule 14 6

Fed. R. Evid. 804(b)(3) 16

Miscellaneous:

11 *Moore's Federal Practice* (2d ed. 1976) 17
4 *Weinstein's Evidence* (1979) 17

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-905

JOSEPH D. LAZZARA, PETITIONER

v.

UNITED STATES OF AMERICA

No. 81-907

SAM C. MARTINO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 81-956

JIMMY FARINA, PETITIONER

v.

UNITED STATES OF AMERICA

No. 81-5700

JOSEPH MACALUSO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 81-5716

FRANK SCIONTI, PETITIONER

v.

UNITED STATES OF AMERICA

No. 81-5748

AMALIA MORGADO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 81-5820

JOHN D. FISHER, PETITIONER

v.

UNITED STATES OF AMERICA

No. 81-5826

ROBERT D. YOUNG, PETITIONER

v.

UNITED STATES OF AMERICA

No. 81-5865

ROSARIO PALERMO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-78a)[1] is reported at 648 F.2d 367.

JURISDICTION

The judgment of the court of appeals was entered on June 19, 1981. All petitions for rehearing were denied on September 17, 1981. The petitions for a writ of certiorari in Nos. 81-905 and 81-5700 were filed on November 12, 1981; the petitions in Nos. 81-907 and 81-5716 were filed on November 13, 1981; the petitions in Nos. 81-956 and 81-5748 were filed on November 16, 1981. However, the petitions in Nos. 81-5820 and 81-5826 were not filed until December 7, 1981, and the petition in No. 81-5865 was not filed until December 10, 1981; therefore, those petitions are out of time under Rules 20.1 and 20.4 of the Rules of this Court.

---

[1] "Pet. App." references are to the Appendix to No. 81-905.

STATEMENT

After a three-month jury trial in the United States District Court for the Middle District of Florida, petitioners were each convicted of conspiring to violate the Racketeer Influenced and Corrupt Organizations ("RICO") statute (18 U.S.C. 1962 (d)), of participating in the conduct of the affairs of a RICO "enterprise" through a pattern of racketeering activity (18 U.S.C. 1962(c)), and of various counts of mail fraud (18 U.S.C. 1341).[2] The court of appeals affirmed their convictions.[3]

The evidence at trial, the sufficiency of which is not disputed, is summarized in the opinion below. The evidence established that an enterprise operating in Tampa and Miami, Florida, from 1973 to 1976 engaged in numerous acts of arson for the purpose of defrauding insurance companies. The enterprise included arsonists, an insurance adjustor, property owners and investors, and a realtor and financier (Pet. App. 5a-7a).

The primary arsonist in the enterprise, Willie Noriega, pleaded guilty and testified for the govern-

---

[2] The petitioners were sentenced to the following terms of imprisonment on the RICO counts: Scionti (No. 81-5716) 12 years; Martino and Lazzara (Nos. 81-905 and 81-907) 10 years; Macaluso and Morgado (Nos. 81-5700 and 81-5748) nine years; Farina, Palermo, Fisher, and Young (Nos. 81-956, 81-5820, 81-5826, and 81-5865) eight years. In addition, each petitioner was sentenced to concurrent terms of five years' imprisonment on the mail fraud counts for which he was convicted.

[3] In a separate consolidated appeal, the court of appeals reversed certain monetary forfeitures imposed under 18 U.S.C. 1963 following petitioners' convictions. The court later vacated that judgment and a rehearing en banc was held. A decision has not yet been announced. Thus, questions relating to the forfeitures are not presented by these petitions.

ment at trial.[4] His testimony outlined the roles and activities of each of the co-defendants in the conduct of the enterprise's affairs. Petitioner Frank Scionti (No. 81-5716), one of the original arsonists, assisted in setting fire to several properties, including one that he owned in his brother's name (Pet. App. 40a-41a, 74a-75a). Petitioner Joseph Macaluso (No. 81-5700) arranged for the burning of his own property and assisted in setting fire to property owned by another co-defendant, Rolando Rodriguez. Macaluso also referred Rodriguez to Noriega for the purpose of arranging that arson (Pet. App. 6a, 48a-50a). Petitioner Morgado (No. 81-5748) "served on the 'marketing staff' of the enterprise as a connection between persons wanting to burn their property and the arsonists" (Pet. App. 46a-47a). She arranged for the burning of an automobile and of real property belonging to co-defendant John Alan Holt. At the suggestion of Noriega and co-defendant Guarino, she purchased a house in her sister's name, and after Noriega burned it down, she helped her sister in filing a fire insurance claim (*id.* 46a-47a, 77a). Petitioners Lazzara (No. 81-905), Farina (No. 81-956), Fisher (No. 81-5820), Young (No. 81-5826), and Palermo (No. 81-5865) arranged for the arsonists to set fire to their properties and submitted fraudulent fire insurance claims (Pet. App. 56a-62a, 63a-65a). They also participated in the enterprise's activities in other ways (see page 11, *infra*). Petitioner Martino (No. 81-907) played a "multifaceted role" in the enterprise (Pet. App. 44a), assisting in the acquisition of several properties to be burned and arranging for loans to enable the enterprise to obtain fire insurance (*id.* at 44a-46a, 76a).

---

[4] Another arsonist and Joseph Carter, an insurance adjustor who knowingly facilitated the fraudulent claims, also pleaded guilty and testified at trial.

ARGUMENT

Petitioners challenge their convictions on numerous grounds. However, all their claims were correctly rejected by the court of appeals in a decision that does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review is not warranted.

1. Most of the petitioners[5] contend (81-907 Pet. 27; 81-956 Pet. 17-19; 81-5700 Pet. 28-31; 81-5716 Pet. 5-7; 81-5748 Pet. 19-24; 81-5865 Pet. 7-9) that the district court erred in denying their motions for severance under Fed. R. Crim. P. 14.[6] They stress the large number of defendants, the length and complexity of the charges, and the length of the trial. Individual petitioners also contend that the bulk of the evidence related to co-defendants rather than to them. Petitioners' arguments lack merit.

Whether to grant a severance under Rule 14 is a matter that lies within the discretion of the trial court, and its decision is reviewable only for a clear abuse of discretion. *Opper* v. *United States*, 348 U.S. 84, 95 (1954); *United States* v. *Salomon*, 609 F.2d 1172, 1175 (5th Cir. 1980); *United States* v. *Lyles*, 593 F.2d 182, 189-190 (2d Cir.), cert. denied, 440

---

[5] Lazzara's petition (No. 81-905) does not mention the severance issue. The petitions of Fisher and Young merely list "[a]doption of Co-Defendant's issues" as one of the questions presented (81-5820 Pet. ii; 81-5826 Pet. ii).

[6] The offenses were properly joined under Fed. R. Crim. P. 8(a) because they were "based on * * * two or more acts or transactions connected together or constituting parts of a common scheme or plan." The defendants were properly joined under Fed. R. Crim. P. 8(b) because they were "alleged to have participated in the same act or transaction" and "in the same series of acts or transactions constituting an offense or offenses."

U.S. 972, 975 and 444 U.S. 847 (1979); *United States* v. *Brooks*, 567 F.2d 134, 139 (D.C. Cir. 1977). In order to prevail, a defendant must show that he was denied a fair trial, not simply that his chances of acquittal might have been better if severance had been granted. See, *e.g.*, *United States* v. *Boyd*, 610 F.2d 521, 525 (8th Cir.) cert. denied, 444 U.S. 1089 (1979); *United States* v. *Michel*, 588 F.2d 986, 1001-1002 (5th Cir.), cert. denied, 444 U.S. 825 (1979); *United States* v. *Rucker*, 586 F.2d 899, 902 (2d Cir. 1978).

Petitioners here have failed to make the showing required to demonstrate that the district court committed reversible error. As the court of appeals recognized, the trial judge took great pains to prevent the joint trial from prejudicing the defendants (Pet. App. 20a-21a):

> He conducted the trial with great skill and with a judicial professionalism much to be admired. He minimized the potential transference of guilt with every tool at his command. He gave careful, detailed instructions about the elements of RICO conspiracy and RICO substantive charges, doing so, as appropriate, as they related to each defendant. Proper uses of evidence were explained.

Such actions weigh heavily against any claims of prejudice resulting from a joint trial. See *United States* v. *Weisman*, 624 F.2d 1118, 1130 (2d Cir.), cert. denied, 449 U.S. 871 (1980); *United States* v. *Luna*, 585 F.2d 1, 5 (1st Cir.), cert. denied, 439 U.S. 852 (1978).

Moreover, it is apparent that the jury in this case meticulously sifted the evidence and segregated the proof pertaining to each defendant and each charge.

After deliberating more than three weeks, the jury found some defendants guilty on all counts; it found some defendants guilty on some counts but not guilty on others; and it found several defendants not guilty on all counts. Petitioner Martino was acquitted on five counts; petitioner Morgado was acquitted on three counts; and petitioners Lazzara, Palermo, and Scionti were each acquitted on one count. Thus, the verdict belies petitioners' claim that the jury failed to give their cases the individualized consideration required. See *United States* v. *Boyd*, *supra*, 610 F.2d at 528; *United States* v. *Zicree*, 605 F.2d 1381, 1389 (5th Cir. 1979), cert. denied, 445 U.S. 966 (1980).

Petitioner Martino contends (81-907 Pet. 17, 28) that the joint trial prejudiced him by preventing two co-defendants, Farina and Guarino, from testifying on his behalf. Similar arguments are commonly advanced by defendants seeking a severance. In order to prevail, a defendant, at a minimum, must specify the exculpatory testimony that the co-defendant would give and must show that the co-defendant is willing to testify but will do so only if a severance is granted.[7] See, *e.g.*, *United States* v. *Santoni*, 585 F.2d 667, 674-675 (4th Cir. 1978); *United States* v. *Boscia*, 573 F.2d 827, 832 (3d Cir. 1978); *United States* v. *Taylor*, 562 F.2d 1345, 1362 (2d Cir. 1977); *United States* v. *Wofford*, 562 F.2d 582 (8th Cir. 1977); *United States* v. *Harris*, 542 F.2d 1283, 1313 (7th Cir. 1976).

In this case, Martino failed to satisfy these threshold requirements. Guarino's affidavit did not specify

---

[7] As with other severance motions, the trial judge's decision may be reversed only if an abuse of discretion is shown. See, *e.g.*, *United States* v. *Haro-Espinosa*, 619 F.2d 789, 793 (9th Cir. 1979); *United States* v. *Edmonds*, 611 F.2d 1386, 1388 (5th Cir. 1980).

the exculpatory testimony he was prepared to give. Instead, as the district court stated, it "merely tracked the indictment in purely negative terms and made purely conclusory assertions." (See Order on Motion of Defendant Martino For a New Trial By Reason of Newly Discovered Evidence at 7.) Furthermore, the affidavit did not satisfactorily show that Guarino would testify only if a severance were granted. The testimony outlined was not self-incriminating on its face, and no other reason was provided for Guarino's alleged conditional willingness to testify.

As for Farina's testimony, Martino's pretrial motion and accompanying affidavits stated that Farina would give exculpatory testimony concerning the arson and fraud charged in counts 9 and 10 of the indictment. However, since Martino was acquitted on those counts, Farina's testimony was not missed.

2. Petitioners assert (81-907 Pet. 24-25; 81-956 Pet. 16-17; 81-5700 Pet. 31-34; 81-5820 Pet. 10-12; 81-5826 Pet. 12) that the evidence at trial did not prove the single conspiracy alleged in the indictment. Rather, they maintain, the proof showed only a series of separate conspiracies between the arsonists and the individual property owners. Their argument clearly lacks merit.

The legal principles applicable to such claims are well known. The essence of a conspiracy is an agreement to engage in unlawful activity. A single conspiracy may continue for an extended period of time and may include numerous illegal transactions. Participants may join the conspiracy after its inception and may withdraw before its completion. Individual conspirators or groups of conspirators may perform different tasks in pursuing their common goal. Each

conspirator need not be familiar with all other co-conspirators or with all aspects of the conspiracy. See, *e.g.*, *Blumenthal* v. *United States*, 332 U.S. 539 (1947); *United States* v. *Boyd*, 595 F.2d 120, 123-124 (3d Cir. 1978); *United States* v. *Armedo-Sarmiento*, 545 F.2d 785, 790 (2d Cir. 1976), cert. denied, 430 U.S. 917 (1977).

When the evidence in this case is viewed, as it must be, in the light most favorable to the government (*Glasser* v. *United States*, 315 U.S. 60, 80 (1942)), it is apparent that a single conspiracy was proven. As the opinion of the court of appeals makes clear (Pet. App. 5a-6a), the evidence established a single conspiracy to commit arson and mail fraud. Although members of the conspiracy played different roles—some set the fires; some owned the buildings that were burned; some served as "go-betweens"; some provided financing to purchase buildings; one was an insurance adjuster—all were interdependent, and many participants played multiple roles. Each was aware of the scope of the criminal enterprise and knew that the efforts of many persons were essential to its success. Even those petitioners farthest removed from the core of the conspiracy—the property owners—were involved in planning more than one act of arson, referred other property owners to the enterprise, or contributed in other ways to the conspiracy's continuing operation (see page 11, *infra*).

3. Petitioners Lazzara, Farina, and Palermo contend (81-905 Pet. 13-17; 81-956 Pet. 12-15; 81-5865 Pet. 10-13) that they were not persons associated with the enterprise who participated in its affairs through a pattern of racketeering activity, as required by 18 U.S.C. 1962(c). Instead, they maintain, they were merely the enterprise's "customers." The

court of appeals properly rejected this claim, stating (Pet. App. 59a):

> Congress decreed that by committing two of the designated predicate crimes related to the affairs of the "enterprise," a person participates in the enterprise and thus violates RICO. As distinguished from the Travel Act, 18 U.S.C. § 1952, and the provision relative to illegal gambling businesses, 18 U.S.C. § 1955, both of which do not reach customers, 18 U.S.C. § 1962 does contemplate the prosecution of those "customers" who engage in a pattern of racketeering activity in furtherance of the affairs of the enterprise. By definition such a person becomes more than a customer of the enterprise.

Moreover, the evidence established that petitioners were not simply one-time customers of the enterprise. Farina (No. 81-956) not only arranged for the burning of a building he owned, but together with Noriega and Martino he planned to acquire other buildings and to burn them down in order to collect the insurance (Pet. App. 60a-62a). The evidence established a similar, unconsummated plan by petitioners Fisher and Young (50 Tr. 311, 313-314). Lazzara was implicated in more than one fire (see Pet. App. 56a-57a; 49 Tr. 260-261), and his bar in Tampa served as a gathering place where the conspirators frequently met to plan their crimes. The evidence established that patrons of the bar, not to mention its owner, became aware of the enterprise's activities.

Petitioners contend (81-956 Pet. 14-15; 81-5820 Pet. 7-10; 81-5826 Pet. 7-10) that 18 U.S.C. 1962(c) is designed to reach only those participants in an enterprise who exercise some control over the enterprise's affairs. That interpretation, however, finds

no support in the wording of the statute, which merely requires direct or indirect participation in the conduct of the enterprise's affairs. Moreover, petitioner's construction would contravene Congress' intent that the statute be "liberally construed to effectuate its remedial purpose" of eradicating organized crime. Pub. L. No. 91-452, Section 904(a), 84 Stat. 947. The statute's net is "woven tightly to trap even the smallest fish, those peripherally involved with the enterprise." *United States* v. *Elliott*, 571 F.2d 880, 903 (5th Cir.), cert. denied, 439 U.S. 953 (1978).

For support of their interpretation of 18 U.S.C. 1962(c), petitioners point to 18 U.S.C. 1955 and cases construing that provision. However, the language of 18 U.S.C. 1955 is narrower than that of 18 U.S.C. 1962(c). While the latter reaches anyone who "participate[s], directly or indirectly, in the conduct of [an] enterprise's affairs," the former reaches only those who conduct, finance, manage, supervise, direct or own all or part of an illegal gambling business.[8]

---

[8] The decision below does not conflict with the disposition of the government's appeal in *United States* v. *Mandel*, 591 F.2d 1347, 1375 (4th Cir. 1979), as petitioners claim (81-905 Pet. 14-15; 81-956 Pet. 15; 81-5820 Pet. 8-9; 81-5826 Pet. 8-9; 81-5865 Pet. 12). In *Mandel*, owners of a "perfectly legitimate business" (591 F.2d at 1376) allegedly transferred an interest in the business as a bribe. The owners were charged with violating 18 U.S.C. 1962(c) by participating in the affairs of an enterprise (their business) "through a pattern of racketeering activity" (two or more acts of mail fraud that formed part of the bribery scheme). The court held that the owners' conduct did not violate 18 U.S.C. 1962(c). Although the owners obviously participated in the affairs of their own business and although they engaged in acts of mail fraud constituting a "pattern of racketeering activity" as defined by statute (18

4. Petitioners also contend (81-907 Pet. 21-22; 81-5820 Pet. 10; 81-5826 Pet. 10) that their predicate crimes—arson and mail fraud—must be viewed as a single act of racketeering, since the arson was committed in order to perpetuate the fraud. As a result, petitioners argue, they did not commit the two "acts of racketeering activity" required to consti-

---

U.S.C. 1961), the court held (591 F.2d at 1375) that they did not participate in the conduct of the enterprise's affairs "*through* a pattern of racketeering activity" (emphasis added) (18 U.S.C. 1962(c)). The court stated that "a connection between the predicate offenses and the charged business must be shown" (591 F.2d at 1375). It added (*id.* at 1376):

> We see no difference between this transfer and the transfer of stock or any other business interest. The transfer may even be in payment for unconnected criminal activity as the government alleges here, but this fact does not, in itself, cause the business, the interest in which is transferred, to become a racketeer influenced organization proscribed by § 1962(c) absent other proof not present in this record.

It is true, as petitioners note, that in explaining its decision the court of appeals stated that the district court had correctly interpreted "the 'conduct or participate' language in § 1962(c) [to require] some involvement in the operation or management of the business" (591 F.2d at 1375). But, in context, that statement was simply a rough way of stating that a defendant must participate "directly or indirectly in the conduct of the enterprise's affairs *through* a pattern of racketeering activity" (emphasis added) (18 U.S.C. 1962(c)). The present inapplicability of the statement upon which petitioners rely is illustrated by the fact that it fails to explain the court's holding in *Mandel*, since the owners of the business clearly were involved in its "operation or management."

In the present case, there was an obvious nexus between the predicate offenses committed by Lazzara, Farina, and Palermo—arson and mail fraud—and the affairs of the enterprise, which was an arson and mail fraud ring.

tute "a pattern of racketeering activity" under 18 U.S.C. 1962(c).[9] The court of appeals correctly rejected this far-fetched argument, stating that the "alleged 'single act of arson committed to defraud an insurance company' actually consisted of the arson and acts of mail fraud in the collection on the insurance policy" (648 F.2d at 402-403). The court added that the "acts of mail fraud were more than 'intertwined events' or 'incidental statutory violations' arising out of the arson" (*ibid.*). Arson and mail fraud are fundamentally different crimes, and they do not merge into a single offense even where they are both committed to further a single illegal scheme. Neither the RICO statute nor its legislative history suggests that separate crimes must be viewed as a single act of racketeering simply because they form part of a single criminal scheme. See *United States* v. *Parness*, 503 F.2d 430 (2d Cir. 1974), cert. denied, 419 U.S. 1105 (1975).

5. Petitioner Macaluso maintains (81-5700 Pet. 34-36) that the RICO statute is unconstitutional because the key term "enterprise" is impermissibly vague. Similar arguments have been rejected, however, by all five circuits that have considered the

---

[9] In the case of Martino (No. 81-907), this claim is also devoid of any factual basis. The evidence showed that he agreed to provide financing for projected arsons (49 Tr. 65-66, 74-75, 121, 176, 181), supplied information concerning buildings that could be inexpensively purchased and burned for profit (*id.* at 75, 102, 176), appraised a building so that petitioner Morgado could obtain insurance (50 Tr. 220), bought the mortgage on a destroyed building from petitioner Macaluso after that property had been burned (49 Tr. 99; 68 Tr. 16), and bought petitioner Palermo's burned-out property after that arson (73 Tr. 257-261). Thus, he was guilty of far more than the two predicate acts required by statute.

issue. *United States* v. *Morelli*, 643 F.2d 402, 412 (6th Cir.), cert. denied, No. 80-1748 (June 29, 1981); *United States* v. *Pantone*, 609 F.2d 675, 679 (3d Cir. 1979); *United States* v. *Aleman*, 609 F.2d 298, 305 n.12 (7th Cir. 1979), cert. denied, 445 U.S. 946 (1980); *United States* v. *Swiderski*, 593 F.2d 1246, 1249 (D.C. Cir. 1978), cert. denied, 441 U.S. 933 (1979); *United States* v. *Herman*, 589 F.2d 1191, 1198 (3d Cir. 1978), cert. denied, 441 U.S. 913 (1979).

A criminal statute is unconstitutionally vague only if it punishes a defendant "for conduct which he could not reasonably understand to be proscribed." *United States* v. *Harriss*, 347 U.S. 612, 617 (1954). See also *Colten* v. *Kentucky*, 407 U.S. 104, 110 (1972). In addition, where, as here, First Amendment rights are not at issue, a claim of vagueness must be evaluated in the light of the facts of the case at hand. *United States* v. *Powell*, 423 U.S. 87, 92-93 (1975); *United States* v. *Mazurie*, 419 U.S. 544, 550 (1975). Under these standards, the constitutionality of the RICO statute is apparent. As the court of appeals put it, "[i]t is not unreasonable to suggest that [the term "enterprise"] encompasses groups associated for the purpose of committing arson with the intent to defraud" (Pet. App. 8a). See *United States* v. *Turkette*, No. 80-808 (June 17, 1981) (term "enterprise" in RICO applies to organization such as that proven here).

6. Finally, petitioner Lazzara argues (81-905 Pet. 23-26) that the court erred in excluding hearsay concerning a statement made by a witness who died before trial.

Lazzara owned a financially unsuccessful laundromat in Miami. Noriega agreed to set fire to the

building so that Lazzara could collect the insurance proceeds. As part of their plan, Lazzara provoked the resignation of the laundromat manager by hiring an alcoholic handyman, Hiram McElroy, to work at the laundromat. Noriega testified that he drove McElroy to the bus station and left him there on the morning of the fire. Noriega then returned to the laundromat and set fire to the building with the assistance of petitioner Scionti and co-defendant Guarino. McElroy died before trial (see Pet. App. 31a).

Lazzara sought to introduce testimony by McElroy's mother concerning a statement allegedly made to her by her son. According to Lazzara's proffer, McElroy told his mother that he awoke in the back of the laundromat during the fire and that he might have caused the fire by failing to turn off a hot plate he was using. Lazzara contends that McElroy's alleged statement fell within the exception to the hearsay rule for statements made by an unavailable witness and "so far tend[ing] to subject him to civil * * * liability * * * that a reasonable man in his position would not have made the statement unless he believed it to be true" (Fed. R. Evid. 804(b)(3)). Lazzara argues that McElroy risked civil liability by admitting that he might have accidentally caused the fire. However, the district court excluded Mrs. McElroy's testimony concerning her son's statement, finding that the statement "was not a declaration sufficiently subjecting him to civil liability" (Pet. App. 32a).[10]

The exclusion of testimony concerning McElroy's statement was proper, because McElroy lacked funds

---

[10] However, the court permitted Lazzara to relate a similar statement allegedly made to him by McElroy (27 Tr. 34).

to satisfy any adverse civil judgment (35 Tr. 5). Thus, it could not be said that his statement "so far tended to subject him to civil * * * liability * * * that a reasonable man in his position would not have made the statement unless he believed it to be true" (Fed. R. Evid. 804(b)(3)).

Furthermore, "Rule 804(b)(3), in conjunction with Rule 403, gives the court sufficient discretion to exclude statements if it finds that they are inherently unreliable because the particular declarant would not have had the requisite belief [that they were against his interest] due to circumstances such as currying favor or ignorance." 4 *Weinstein's Evidence* ¶ 804(b)(3)[02], at 804-98 to 804-99 (1979). See also *Filesi* v. *United States*, 352 F.2d 339, 343 (4th Cir. 1965); *Workman* v. *Cleveland-Cliffs Iron Co.*, 68 F.R.D. 562, 563 (N.D. Ohio 1975); 11 *Moore's Federal Practice* § 804.06(3)[3], at 284-285 (2d ed. 1976). Here, the evidence showed that McElroy had been, at the least, the dupe of Martino and other members of the enterprise. For reasons noted and because his alleged statement was contradicted by Noriega's testimony (see Pet. App. 31a) and the fire inspector's report,[11] the inherent unreliability of his statement was clear.[12]

---

[11] The fire inspector concluded that the fire had been caused by placing a plastic container containing an inflammable liquid on a hotplate, an arson technique previously used by members of this enterprise. (Vol. 6, 3d Supp. Record on Appeal 8-9; 49 Tr. 26-27, 39-41, 43-44, 160; 50 Tr. 288-289.)

[12] The decision below does not conflict with *Gichner* v. *Antonio Troiano Tile & Marble Co.*, 410 F.2d 238 (D.C. Cir. 1969), as petitioner claims (81-905 Pet. 25). There, an unavailable witness had admitted possible responsibility for an accidental fire, and the court held that hearsay concerning that statement was admissible. *Gichner* is factually distinguish-

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

SARA CRISCITELLI
Attorney

FEBRUARY 1982

---

able from this case because there in it was not apparent that the declarant was judgment-proof and because the reliability of his statement was not suspect.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 367045 606